TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 706

MORRIS ENGEL, APPELLANT,

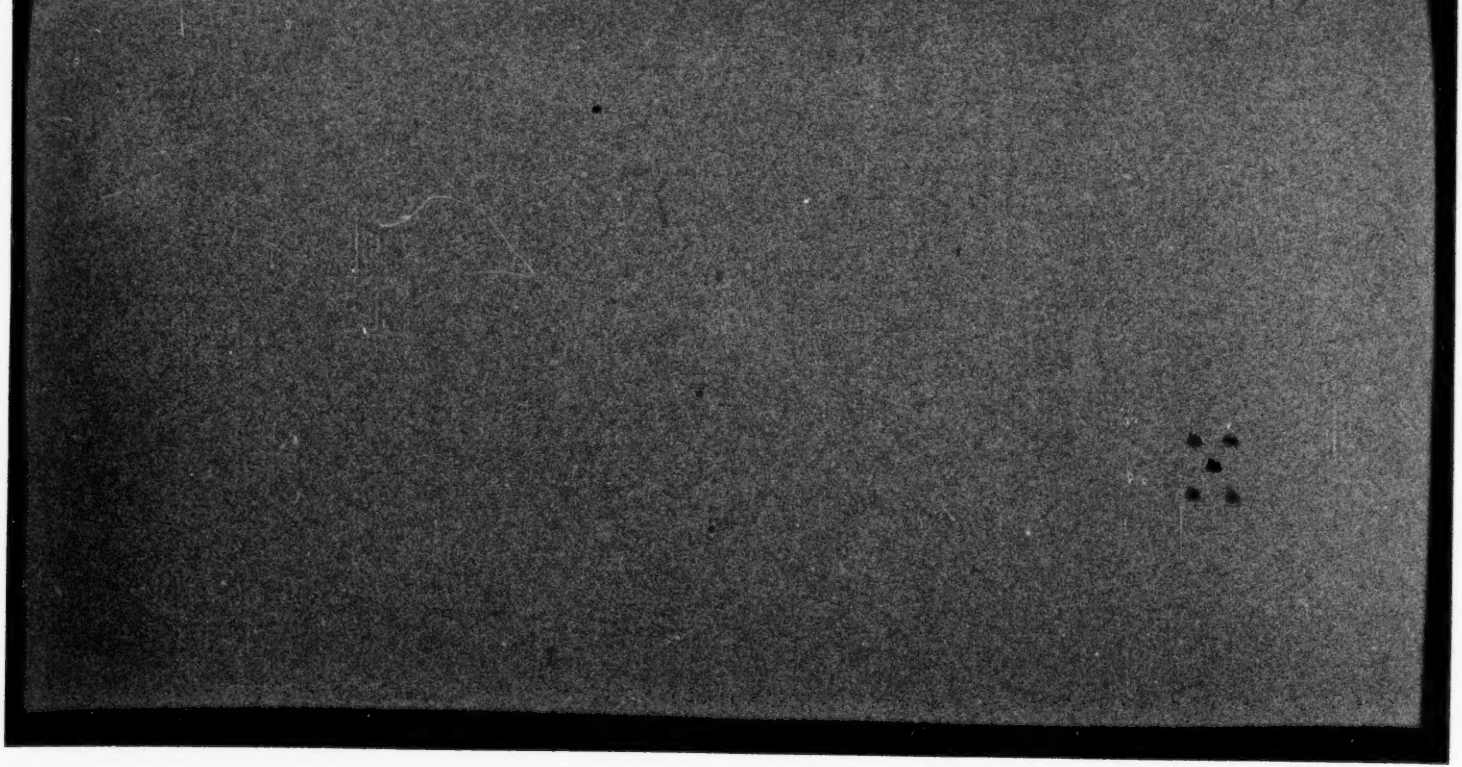
vs.

JOHN M. O'MALLEY, FRANK MOSS, CLARK WILLIS AND WILLIAM F. HALPIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT OF NEW YORK.

FILED SEPTEMBER 24, 1938.

(22,324)



(22,324.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 703.

MORRIS ENGEL, APPELLANT,

vs.

EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS, AND WILLIAM F. BAKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1910.

1 The President of the United States of America to Edward R. O'Malley, Charles Whitman, Frank Moss, Clark Williams, and William F. Baker, Greeting:

[L. S.]

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of September, A. D. 1910, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Morris Engel, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 8th day of August in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and Thirty-fifth.

JOHN A. SHIELDS, *Clerk.*

CHAS. DUSHKIND,
Solicitor for Complainant.

The Defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of September, 1910, or the bill will be taken pro confesso against them.

J. A. S., *Clerk.*

1*a* I hereby certify, That on the 8th day of August, 1910, at the City of New York, in my district, I served the within subpœna in equity upon the within named defendant Clark Williams by exhibiting to Allen P. Hallett, Deputy Comptroller at No. 128 B'way, N. Y. C., the within original, and at the same time leaving with him a copy thereof for Clark Williams.

I hereby certify, That on the 8th day of August, 1910, at the City of New York, in my district, I served the within subpœna in equity upon the within-named defendant William F. Baker by exhibiting to Fred'k H. Bugher, 1st Deputy Commissioner at Police Headquarters cor. Grand and Centre Sts. N. Y. City, the within original and at the same time leaving with him a copy thereof for Wm. F. Baker.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated Aug. 8, 1910.

I hereby certify, That on the 8th day of August, 1910, at the City of New York, in my district, I personally served the within subpœna in equity upon the within-named defendant Frank Moss by exhibiting to him at the Criminal Court Bldg., Centre St., N. Y. City, the within original and at the same time leaving with him a copy thereof.

I hereby certify, That on the 8th day of August, 1910, at the City of New York in my district, I served the within subpœna in equity upon the within-named defendant Edward R. O'Malley by exhibiting to Amos H. Stephens, Deputy Attorney General at 299 B'way, N. Y. City, the within original, and at the same time leaving with him a copy thereof for Edward R. O'Malley.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated August 8, 1910.

The above services made by direction of attorneys herein.

U. S. Circuit Court, Southern District N. Y. Filed Aug. 8, 1910. John A. Shields, Clerk.

2 United States Circuit Court for the Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

To the Honorable Judges of the Circuit Court of the United States in and for the Southern District of New York:

The complainant herein presents this, his Bill of Complaint against Edward R. O'Malley, who is the Attorney General of the State of New York; Charles Whitman, who is the District Attorney of the County of New York; Frank Moss, who is the Acting District Attorney of the County of New York, in place and absence of said Charles Whitman, and Clark Williams, who is the Comptroller of the State of New York, and William F. Baker, who is Police Commissioner of New York City, and thereupon your Orator complains and says:

2a First. That during the times herein mentioned and for a number of years prior thereto the complainant has been and is now engaged in the business of receiving deposits of money from various persons for the purpose of transmission of same to other persons in various cities, states and countries and also of receiving deposits of money from various people for safe-keeping and various other purposes; that said business has been carried on by your Orator in co-partnership with one Leon G. Eckert, under the firm name and style of Engel and Eckert; that the complainant has in

fact been engaged in said line of business for over twenty (20) years, and that during all these years the complainant has succeeded in building up and establishing for himself an excellent reputation as a result of which your Orator's business has become very profitable and the good will thereof has become and is very valuable; that since 1903 your Orator has been engaged in said business with said partner as aforesaid on their own account under the said firm of Engel and Eckert, and that by reason of your Orator's long experience and good reputation in said business, your Orator, together with his partner, has succeeded in building up a good business of receiving deposits from various persons for the purpose of transmission to others in various cities and states, other than the State of New York, and foreign countries, for which they received certain commissions, percentages or profits yielding them considerable incomes from time to time and that in connection therewith, your Orator and your Orator's said firm has also been receiving deposits of money from such parties for safe-keeping, it being customary for such depositors to make deposits in exceedingly small sums from time to time
3 until their deposits aggregated a certain amount sufficient to be transmitted to their friends, relatives or other parties to places other than the State of New York, and mainly to foreign countries. That your Orator is a citizen of the United States.

Second. That your Orator has thus spent twenty (20) years of his life building up the aforesaid business and his good name, credit and reputation in connection therewith and that practically all your Orator's savings and earnings during the said twenty (20) years have at all times been and are now invested in said business. Besides the skill and experience that your Orator has acquired in many years that he has been engaged in said business your Orator has also gone to considerable expense in building up his trade and custom, and your Orator has invested in said business considerable sums of money, and that said business and the good will thereof is of great value to your Orator and constitutes a valuable property right.

Third. That on or about the 23rd day of May, 1910, a certain law was passed and adopted by the legislature of the State of New York, approved by the Governor and known and designated as Chapter 348 of the Laws of 1910, being an Act to amend the General Business Law in relation to private banking to repeal Article 10, thereof relating to ticket agents; that a true copy of said law is hereto annexed as part hereof and marked Exhibit A; that by said law it is provided among other things, that no individual or partnership shall hereafter engage directly or indirectly in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another or for any other purpose in cities of the first class
4 without first having obtained from the Comptroller a license to engage in such business; that in order to obtain such license certain conditions are imposed among which are the conditions, that the applicant for such a license must deposit with the Comptroller of the State of New York, Ten thousand ($10,000.00) Dollars in money or its equivalent, and in addition thereto a surety company bond, the penal sum of which shall be fixed by the Comp-

troller, but which shall not be less than ten thousand ($10,000.00) dollars and not more than fifty thousand ($50,000.00) dollars; and it is further provided that even after complying with the conditions imposed therein the application for such a license may be approved or disapproved in the discretion of the Comptroller; and it is further provided that certain persons or individuals are exempt from said law and that the said law shall not apply to such persons, individuals therein specified, that is to say: that the said law shall not apply among others to hotel keepers, to express companies, telegraph companies receiving money for transmission, nor to individuals or partnerships receiving money on deposit for safe-keeping or for transmission to others or for any other purpose where the average amount of each sum received on deposit for transmission, etc., during the fiscal year preceding the date of the affidavit, etc., shall not be less than five hundred ($500.) dollars or to any individual or partnership who shall file a bond of one hundred thousand ($100,000.00) dollars in a city having a population of one million or over, or fifty thousand ($50,000.00) dollars in other cities and said law also provides for the making and filing of reports to the State Comptroller from time to time and it also provides that anyone violating
5 the provisions of said act shall be guilty of a misdemeanor. and anyone failing to make or file the required reports shall forfeit to the People of the State of New York, the sum of One hundred ($100.00) dollars for every day that such report shall be delayed or withheld, etc.

Fourth. That under and by virtue of the constitution of the United States and particularly of the Fourteenth Amendment thereto, your Orator is entitled to the right to carry on his aforesaid business and to derive all the benefits, profits, gains and advantages that may come to him by reason thereof or in connection therewith; and to use, employ, and enjoy the capital invested in said business and the valuable good will thereof and the custom and trade established and built up by your Orator in connection with his said business all of which constitutes the valuable property right of your Orator and any law passed by the legislature of the State of New York depriving your Orator of the aforesaid rights or either of said rights, deprives your Orator of his property without due process of law and denies your Orator the equal protection of the law and is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and the aforesaid Acts of legislature of the State of New York is for the foregoing reasons in violation of the said provisions of the Fourteenth Amendment to the Constitution of the United States.

Fourth. A. That your Orator has been and is engaged in the business aforesaid in the City of New York, which is a city of the first class within the meaning of the aforesaid statute.

6 Fourth. B. That your Orator's main business consists of receiving and obtaining deposits of money for the purpose of transmission of same to parties in states other than the State of New York, and in foreign countries, that your Orator is therefore

engaged in Inter-State Commerce among the several states and with foreign nations and that the aforesaid act of the legislature of the State of New York, attempts to regulate your Orator's business, and attempts to regulate and imposes a tax upon commerce with foreign nations, and among the several states, in violation of the Constitution of the United States.

Fourth, C. That your Orator is informed and believes that the defendant Williams, the Comptroller of the State of New York, intends to enforce said law against your Orator, if your Orator should continue to carry on the aforesaid business after September 1st, 1910, without a license from the said defendant Williams. That your Orator cannot obtain such license because your Orator cannot possibly comply with the terms and conditions imposed by the said law, for the granting of such license and your Orator is not one of the individuals nor is your Orator's firm one of the partnerships exempt from the operation of said law and who are authorized by said law to carry on such business without such license and it is furthermore absolutely impossible for your Orator or your Orator's firm to file a bond with the Comptroller in the sum of One hundred thousand ($100,000) dollars, your Orator's business being conducted in a city having a population of one million, in order to become exempt from the operation of said law.

Fifth. That said Chapter 348 of the Laws of 1910, here-
7 inbefore referred to is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives your Orator of his right to continue to carry on his established business and of his right to use, employ and enjoy the capital invested therein and the good name, reputation, trade and custom and the good will of said business built up by your Orator, and it deprives your Orator of his property without due process of law, and said law furthermore denies your Orator the equal protection of the law and offers privileges to certain individuals which it does not offer to your Orator and that said law is otherwise unconstitutional — in violation of the Constitution of the United States in other respects.

Sixth. That it is an absolute physical impossibility for your Orator to comply with the provisions of the said statute; that your Orator has not the means or capital that would enable him to deposit with the State Comptroller the sum of ten thousand ($10,000.00) dollars in money or its equivalent and a further bond for an additional sum to be fixed by the Comptroller for not less than ten thousand ($10,000.00) dollars as required by the said statute; that your Orator is therefore unable to procure the required license to permit him to carry on his aforesaid business; that your Orator has a large number of customers who have always had and now have full faith in your Orator and in his honesty and integrity and who have at all times been and are now willing to trust your Orator with the handling of their moneys for transmission to divers people in States other than the State of New York and largely in foreign countries without the giving or depositing of such security as required by the

statute; that the extent of your Orator's business does not re-
8 quire security to the amount of Twenty thousand ($20,-
000.00) dollars which is the minimum amount of security required under said law and that if said law should be enforced against your Orator he would simply be compelled to close up and abandon his business and to lose not only his direct profits or income therefrom, but the valuable good will and the good name and reputation that he had built up during the last twenty years.

Seventh. Your Orator is informed and believes that the defendant O'Malley, the Attorney General of the State of New York, and the defendant Whitman, the District Attorney of New York County, and the defendant Moss, the Deputy or Acting District Attorney of New York County, intend to prosecute your Orator if he should continue to carry on his business in violation of said statute, and to institute suits for the recovery of the penalties imposed by said statute for the violation of certain provisions therein specified under Section 1962 of the Code of Civil Procedure which provides that where a penalty is incurred to the People of the State of New York, the Attorney General or the District Attorney — in which the action is triable must bring the action to recover the full penalty; that if such statute should be enforced or if said defendants O'Malley, Whitman and Moss should begin prosecutions against your Orator for continuing to carry on his business without complying with the said statute, your Orator would be subjected to repeated and continuous punishment, fines, penalties, etc., and your Orator would be otherwise compelled to suffer humiliation, duress, restraint and imprisonment and
that the damage to your Orator would be irreparable and ab-
9 solutely destructive of his business and his property in violation of the Fourteenth Amendment to the Constitution of the United States and denying your Orator the equal protection of the law and that he would be deprived of his property without due process of law.

Eighth. That the penalties, fines and punishment imposed by said statute were intended and calculated to coerce and force your Orator to acquiesce therein.

Ninth. That the defendants O'Malley, Attorney General of the State of New York, and Whitman, the District Attorney of the County of New York, and Moss, the Acting or Deputy District Attorney of the County of New York, and Baker, the Police Commissioner of New York City, have no discretion in the matter, and the absolute duty is imposed on them to enforce such statute and to institute and prosecute suits and proceedings to impose the fines, and inflict the penalties and punishments specified in said statute.

Tenth. Your Orator is advised by counsel and therefore avers and claims that there is no remedy except in Equity to test adequately and completely the said Act and that in the absence of such remedy in Equity your Orator would be deprived of his valuable property rights without due process of law and your Orator would furthermore be deprived of his liberty and right to make and enter into contracts, and he would likewise be deprived of equal protection of the law in contravention of the provisions of the Constitution of

the United States and on which account your Orator invokes the jurisdiction of this Court to protect him against the aforesaid
10 threatened invasion by the defendants of his inherent rights under and guaranteed by the Constitution of the United States.

Eleventh. To the end therefore that your Orator may have the relief which he can only obtain in a Court of Equity and that the defendants may each answer the premises but not upon oath or affirmation the benefit thereof is hereby expressly waived by your Orator, now prays:

First. That it be adjudged and decreed that Chapter 348 of the Laws of 1910 passed by the Legislature of the State of New York, and approved by the Governor on the 23rd day of May, 1910, is illegal and void because in contravention of the Fourteenth Amendment of the Constitution of the United States and to as aforesaid and other provisions contained in the Constitution of the United States in that it impairs the obligation of the contract right of your Orator herein referred to, and it attempts to regulate and impose a tax upon interstate and foreign commerce.

Second. That it be adjudged and decreed that your Orator has no adequate remedy at law for the injury which would result from the threatened enforcement of said Act.

Third. That it be adjudged and decreed that your Orator be granted writs, both temporary and permanent, of injunction issuing out of and under the Seal of this Honorable Court against the defendants, restraining them and each of them, and each of their officers, agents, servants, employees and any and every person acting under and by virtue of the authority of said Act from in any way enforcing or attempting to enforce the said Act or any of
11 the provisions thereof against your Orator and that a restraining order may be granted against the defendants, and each of them, their officers, agents and employees restraining them as herein stated until Your Honorable Court shall determine upon motion and hearing whether a temporary injunction with like effect shall not be granted *pendente lite.*

Fourth. Your Orator further prays that Your Honors grant unto Your Orator a Writ of Subpœna *ad respondendum* issuing out of and under the Seal of this Honorable Court to be directed to the said defendants commanding them and each of them on a certain day and under a certain penalty to be there inserted to appear before your Honors in this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises and further to stand, do, perform and abide such further order and decree as to your Honors may seem meet, and also that a writ of provisional injunction to the same purport, tenor and effect as hereinbefore set forth and prays to be granted during the pendency of the action, and Your Orator will ever pray, etc.

MORRIS ENGEL,
Complainant.

CHARLES DUSHKIND,
Solicitor for Complainant, and of Counsel, Office & Post Office Address: 5 Beekman Street, Borough of Manhattan, New York City.

12 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Morris Engel, being duly sworn, deposes and says: that he is the Complainant in the within action; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

MORRIS ENGEL.

Sworn to before me this 5th day of August, 1910.
MORRIS WEISS,
[SEAL.] *Notary Public, New York Co.*

EXHIBIT A.

General—All Counties.

(Thirty-two Folios.)

Laws of New York—By Authority.

Chap. 348.

An Act to amend the general business law in relation to private banking, and to repeal article ten thereof, relating to ticket agents.

Became a law May 23, 1910, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

13 SECTION 1. Chapter twenty-five of the laws of nineteen hundred and nine, entitled "An Act relating to general business, constituting chapter twenty of the consolidated laws," is hereby amended by inserting therein a new article, to be article three-*a* thereof, to read as follows:

Article 3-A.

Private Banking.

Section 25. Licenses, bonds and deposits.
26. Books to be kept and records to be made; revocation of licenses.
27. Penalties for conducting business without license, et cetera.
28. Perjury.
29. Penalty for failure to make report.

29-*a*. Discharge and renewal of bonds, substitution of securities, et cetera.
29-*b*. Burden of proof in actions against licensee.
29-*c*. Time within which money is to be transmitted.
29-*d*. Exceptions.
29-*e*. Constructions of this article.
29-*f*. Additional penal provision.
29-*g*. Bureau of licenses.

25. Licenses, Bonds and Deposits.—Except as provided in section twenty-nine-*d*, no individual or partnership shall hereafter engage directly or indirectly in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another or for any other purpose in cities of the first class without having first obtained from the comptroller a license to engage in such busi-
14 ness. Before receiving such license the applicant therefor shall file with the comptroller a written statement in the form to be prescribed by the comptroller and verified by the individual or members of the firm making the application, showing the amount of the assets and liabilities of the applicant, designating the place where the applicant proposes to engage in business, that the applicant has been, or if the applicant shall constitute a partnership, that majority of the members thereof having a controlling interest in the business of such partnership have been continuously for a period of five years immediately preceding the date of such application resident in the United States. Such applicant shall at the same time deposit with the comptroller ten thousand dollars in money or in securities which shall consist of bonds of the United States, of this State or of any municipality thereof, or other bonds approved by the comptroller, and if a deposit of securities shall be so made in lieu of ten thousand dollars in money, the comptroller shall thereafter require the applicant to maintain such deposit at all times at a value which shall equal the sum of ten thousand dollars. In addition thereto there shall be presented to the comptroller a bond to the people of the State of New York executed by the applicant and by a surety company approved by the comptroller, conditioned upon the faithful holding of all moneys that may be deposited with the applicant, in accordance with the terms of the deposit and the repayment of such moneys so deposited and upon the faithful transmission of any money which shall be delivered to such applicant for transmission to another, and in the event of the insolvency or bankruptcy of the applicant, upon the payment of the full
15 amount of such bond to the assignee, receiver or trustee of the applicant, as the case may require, for the benefit of the persons making such deposits and of such persons as shall deliver money to the applicant for transmission to another. The penalty of the bond shall be a sum fixed by the comptroller, which shall not be more than fifty thousand dollars nor less than ten thousand dollars. In lieu of the aforesaid bond the applicant may deposit and the comptroller shall accept, money and securities of the character above described. The money and securities so deposited shall be

held on the conditions specified in the aforesaid bond. If securities be deposited in lieu of the aforesaid bond, and be accepted as hereinafter provided, the comptroller shall require the applicant to maintain such deposit at a value equal to the amount fixed as the penalty of the bond in lieu of which such money and securities shall be so deposited. Upon the receipt of such application the comptroller shall cause to be posted upon a bulletin to be maintained by him in his office in a place accessible to the general public, at noon of the succeeding Friday the name of the applicant and whether individual or partnership, and the proposed business address designated in the application. After notice of the application shall have been so posted for a period of two weeks he may in his discretion approve or disapprove the application. In the event of his approval he shall accept the money, securities and bond, if there be one, and hold them for the purposes herein set forth, and shall issue a license authorizing the applicant to carry on the aforesaid business at the place designated in the application and to be specified in the license certificate. For such license the licensee shall pay a fee of Fifty dollars. Such license shall not be transferred or assigned. It shall not authorize the transaction of business at
16 any place other than that described in the license certificate, except with the written approval of the Comptroller. Immediately upon the receipt of the license certificate issued by the comptroller pursuant to this article the licensee named therein shall cause such license certificate to be posted and at all times conspicuously displayed in the place of business for which it is issued, so that all persons visiting such place may readily see the same. It shall be unlawful for any person or partnership holding such license certificate to post such certificate or to permit such certificate to be posted upon premises other than those designated therein or to which it has been transferred pursuant to the provisions of this article, or knowingly to deface or destroy any such license certificate. If it shall be established to the satisfaction of the comptroller in accordance with rules and regulations by him prescribed, that an unexpired license certificate issued in accordance with the provisions of this article has been lost or destroyed without fault on the part of the holder, the comptroller shall issue a duplicate license therefor. The money and securities deposited with the comptroller as herein provided, and the money which in case of default shall be paid on the aforesaid bond by any applicant or the surety thereof, shall constitute a trust fund for the benefit of the depositors of the licensee and of such persons as shall deliver money to such licensee for transmission to another, and such beneficiaries shall be entitled to an absolute preference as to such money or securities, over all general creditors of the licensee such money and securities shall in the event of the insolvency or bankruptcy of the licensee be delivered by the comptroller on the order or judgment of a court of competent jurisdiction to the assignee, receiver or trustee of the licensee de-
17 signated in such order or judgment. The comptroller shall keep a book or books in which the licenses granted and the bonds filed shall be entered in alphabetical order, together with a

statement of the date of the issuance of the license, the name or names of the principals, the place where the business licensed is to be transacted and the name of the surety company upon the bond filed, and the amount of all moneys and a description of all securities deposited, which record shall be open to public inspection. The comptroller shall cause to be printed annually on the first day of January and distributed upon application, a list of all licenses granted and remaining unrevoked. The comptroller shall from time to time pay over to each such licensee all moneys received by him as interest upon any monies or securities deposited in accordance with the provisions of this article.

§26. Books to be Kept and Records to be Made; Revocation of Licenses.—Each licensee shall keep books of account showing full and complete records of all business transacted and a full statement of all assets and liabilities and shall four times in each year as of such days as the comptroller shall designate by a notice to be posted upon the bulletin in his office and by written notice delivered at the place of business of such licensee or deposited in the post office in a post-paid wrapper directed to him at such place of business, filed in the comptroller's office within ten days after the date of such notice, a written statement under oath in such form as shall be prescribed by the comptroller, showing the amount of the assets and liabilities of the licensee, which report shall be accessible to the public at all reasonable times. The license issued shall be
18 revocable at all times by the comptroller for cause shown, and in the event of such revocation or of a surrender of such license, no refund shall be made in respect of any licensee paid under the provisions of this article. Every license certificate shall be surrendered to the comptroller within twenty-four hours after notice in writing to the holder that such license has been revoked. In case of the revocation of such license the money and securities and the bond if there be one, received from the licensee, shall continue to be held by the comptroller, until otherwise directed by the order or judgment of a court of competent jurisdiction.

§27. Penalties for Conducting Business Without License, et cetera.—Any person or partnership carrying on the business specified in section twenty-five of this article without having obtained from the comptroller a license therefor, or who shall carry on such business after the revocation of the license to carry on such business, or who, without such license shall, on any sign, letter-head, advertisement or publication of any kind use the word "banking" or banker or any equivalent term in any language, in connection with any business whatsoever, or who shall fail to display the license certificate as provided in section twenty-five hereof, or who shall fail to keep books of account or to make the reports as herein provided, or who shall advertise or publish in any manner whatsoever, either orally or in writing, any statement intended to convey or actually conveying the idea or impression that such licensee is in any way under the supervision of this State, or of any officer thereof, or that this State or any officer thereof has passed in any way what-

soever upon the responsibility, solvency or qualifications of
19 such licensee to engage in such business, or that this state or any officer thereof, has examined any accounts of said licensee or has in any way certified that such licensee is in any way a fit person to carry on such business shall be guilty of a misdemeanor.

§28. Perjury.—Any person who in any application for a license presented to the comptroller or in any report made under this article, shall swear falsely as to the amount of the assets or liabilities of the applicant, or as to the amount of the assets or liabilities of a licensee, or in any other particular or in any affidavit made under section 29-*d* of this article shall swear falsely as to any fact therein stated, is guilty of perjury.

§29. Penalty for failure to make reports.—Any person or partnership who shall fail to make any reports required by this article within the time specified for the same, shall forfeit to the people of the State of New York, the sum of One hundred dollars for every day that such report shall be delayed or withheld. The money forfeited under this section shall be recovered in an action brought in the name of the People of the State and with all moneys received as fees for the issuance of the licenses provided for herein shall be paid into the State treasury to the credit of the general fund.

§29-*a*. Discharge and renewal of bonds, substitution of securities, et cetera.—The surety in a bond given pursuant to this article may give notice to the comptroller in writing requesting to be released from responsibility on account of any future breach of the condition of the bond, and that the principal in the bond be re-
20 quired to give a new surety, and thereupon the Comptroller shall give notice in writing directed to the principal upon said bond at the place designated by him for the transaction of business requiring him within ten days from the day therein specified to file a new bond in the form required therein, with a new surety approved by the Comptroller, or money or securities in lieu thereof, and upon the filing of such new bond or such money or securities in lieu thereof, within the time specified, but not before, the surety upon the old bond shall be discharged from liability upon the bond given by it for any subsequent act or default of the principal. Whenever money or securities are deposited with the comptroller pursuant to this article, he may in his discretion permit the substitution of securities for money, or of money for securities, in whole or in part, or of money or securities for any bond, or of a bond for money or securities deposited (other than the money or securities of the value of ten thousand dollars which the licensee is required by section 25 hereof to keep at all times on deposit with the comptroller), or the withdrawal of securities deposited and the substitution of others of equal value in their place, or if the total value of the securities become substantially impaired he shall require the deposit of money or additional securities sufficient to cover the impairment in value. In the event of the failure of such principal to file a new bond or such money or securities in lieu thereof, or to deposit money or additional securities to cover any impairment of

value of securities theretofore deposited, within the time specified, the comptroller shall forthwith revoke the license of such principal. In the event that the licensee shall at any time discontinue the business licensed or with respect to which a bond shall have
21 been filed or money or securities shall have been deposited pursuant to this article, the comptroller on the order or judgment of a court of competent jurisdiction, may cancel the bond filed by the licensee and return to the licensee all moneys and securities deposited.

§29-*b*. Burden of Proof in Actions Against Licensee.—In any action against a licensee to recover money deposited with such licensee for transmission, the burden of proving the transmission to and receipt of the money by the person to whom such money is directed to be paid shall be upon the licensee to whom such money was delivered for transmission. Proof by a properly authenticated affidavit of such licensee or his duly authorized agent showing the transmission of such money to the person to whom the same was to be transmitted, or to correspondent of the licensee to whom such money may have been transmitted for payment to the person to whom such money was to be paid together with a properly authenticated receipt signed by the consignee of such money, or in lieu of such receipt a properly authenticated affidavit of the agent of the licensee showing the fact of payment shall be deemed sufficient evidence to shift the burden of proof to the plaintiff.

§29-*c*. Time within which Money is to be Transmitted.—All moneys received for transmission to a foreign country by any licensee shall be forwarded to the person to whom the same is directed to be transmitted within five days after the receipt thereof, and every person who shall fail to so forward the same within the time specified shall be guilty of a misdemeanor.

22 §29-*d*. Exceptions.—The foregoing provisions shall not apply (1) To any corporation or "individual banker" authorized to do business under the provisions of the banking law nor to any association organized under the National banking act; nor (2) to any hotel keeper who shall receive money for safe-keeping from a guest, nor (3) to any express company or telegraph company receiving money for transmission; nor (4) to any individual or partnership receiving money on deposit for safe-keeping or for transmission to others, or for any other purpose, where the average amount of each sum received on deposit, or for transmission, by such individual or partnership, in the ordinary course of business, during the fiscal year preceding the date of the affidavit hereinafter specified shall not be less than five hundred dollars, proof of which fact by affidavit to the satisfaction of the comptroller shall be made by the individual or a member of the partnership seeking exemption hereunder, whenever thereunto requested by the comptroller; nor (5) to any individual or partnership who would otherwise be required to comply with section 25 of this article, who shall file with the comptroller a bond in the sum of One hundred thousand dollars, approved by the comptroller as to form and sufficiency for the purpose and conditioned as in said section prescribed, where the business is conducted in a city having a population of one million

or over and if conducted elsewhere in the state such bond shall be in the sum of fifty thousand dollars; or in lieu thereof money or security approved by the comptroller of the same amount. The provisions of section 29-*a* shall be applicable to such bond, or deposit of money or security.

23 §29-*e*. Construction of this Article.—Nothing in this article contained shall be construed to require the comptroller to make any inquiry or examination as to the responsibility or solvency of any applicant for a license or of any licensee hereunder.

§29-*f*. Additional Penal Provision.—Any licensee who shall violate any of the provisions of this article the violation of which has not hereinbefore been expressly made a misdemeanor, or a felony, shall be guilty of a misdemeanor.

§29-*g*. Bureau of Licenses.—The Comptroller shall establish a license bureau for the purpose of complying with the provisions of this article.

§2. Article 10 of such Chapter is hereby repealed, but said repeal shall not affect any right already existing or accrued, or any liability incurred prior to the passage of this act.

§3. This act shall take effect September 1st, 1910.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

SAMUEL S. KOENIG,
Secretary of State.

24 *Demurrer of Defendants O'Malley and Williams.*

United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY and CLARK WILLIAMS, Impleaded with Charles Whitman, Frank Moss and William F. Baker, Defendants.

The defendants Edward R. O'Malley and Clark Williams demur to the bill of complaint in this cause, on the following grounds:

First. That the complainant has not by his said bill made such a cause as entitles him in a Court of Equity to any relief against the defendants or either of them as to the matters contained in the said bill, or any of such matters.

Second. That said bill does not contain any matter of equity whereon this Court can ground any decree, or give the complainant any relief or assistance as against these defendants or either of them, *or either of them*.

Third. On the ground that the complainant in his said
25 bill has not stated facts sufficient to constitute a cause of action against the defendants or either of them.

Fourth. That it appears on the face of the said bill that Chapter Three hundred and forty-eight (348) of the Laws of 1910 of the State of New York is in all respects valid and in conformity with the Constitution of the United States and with the several amendments thereof.

Wherefore for these and divers other good causes of demurrer these defendants pray judgment of the Court whether they shall be compelled to answer further, and they pray to be hence dismissed with costs.

EDWARD R. O'MALLEY,
Attorney General of the State of New York,
Solicitor for the Defendants O'Malley and
Williams, Capitol, Albany, New York.

LOUIS MARSHALL,
Of Counsel.

I hereby certify that I am of counsel for the defendants Edward R. O'Malley and Clark Williams in this cause, and that in my opinion the foregoing demurrer is well founded in point of law.

LOUIS MARSHALL,
Of Counsel.

UNITED STATES OF AMERICA,
State of New York, County of Albany, ss:

Edward R. O'Malley and Clark Williams, being severally
26 duly sworn, each for himself says, that he is one of the defendants in the above-entitled cause; that he has read the foregoing demurrer and knows the contents thereof, and that the same is not interposed for delay.

EDWARD R. O'MALLEY.
CLARK WILLIAMS.

Subscribed and sworn to before me this 20th day of August, 1910.

[SEAL.] WM. O. REMSEN,
Notary Public, Westchester Co.

Demurrer of Defendant Frank Moss.

United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES S. WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

The defendant Frank Moss demurs to the bill of complaint in this cause, on the following grounds:

27 First. That the complainant has not by his said bill made such a cause as entitles him in a Court of Equity to any relief against the defendant as to the matters contained in the said bill, or any of such matters.

Second. That said bill does not contain any matter of equity whereon this Court can ground any decree, or give the complainant any relief or assistance as against these defendants or either of them.

Third. On the ground that the complainant in his said bill has not stated facts sufficient to constitute a cause of action against the defendant.

Fourth. That it appears on the face of the said bill that Chapter Three hundred and forty-eight (348) of the Laws of 1910 of the State of New York is in all respects valid and in conformity with the Constitution of the United States and with the several amendments thereof.

Wherefore for these and divers other good causes of demurrer this defendant prays judgment of the Court whether he shall be compelled to answer further, and he prays to be hence dismissed with costs.

ROBERT C. TAYLOR,
Solicitor for the Defendant Frank Moss.

32 Franklin Street, Borough of Manhattan, New York City.

ROBERT S. JOHNSTONE,
Of Counsel.

28 I hereby certify that I am of counsel for the defendant Frank Moss in this cause, and that in my opinion the foregoing demurrer is well founded in point of law.

ROBERT S. JOHNSTONE,
Of Counsel.

UNITED STATES OF AMERICA,
State of New York, County of New York, ss:

Frank Moss, being duly sworn, says, that he is one of the defendants in the above-entitled cause; that he has read the foregoing demurrer and knows the contents thereof, and that the same is not interposed for delay.

FRANK MOSS.

Subscribed and sworn to before me this 20th day of August, 1910.

ARTHUR R. SMILEY,
Notary Public, N. Y. County.

29 *Demurrer of William F. Baker.*

United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
WILLIAM F. BAKER, Impleaded with EDWARD R. O'MALLEY, CLARK WILLIAMS, CHARLES WHITMAN, and FRANK MOSS, Defendants.

The defendant, William F. Baker, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows:

First. That the complainant has not by his said bill made such a cause as entitles him in a Court of Equity to any relief against the defendants or either of them as to the matters contained in the said bill, or any of such matters.

Second. That said bill does not contain any matter of equity whereon this Court can ground any decree, or give the complainant any relief or assistance as against these defendants or either of them.

30 Third. On the ground that the complainant in his said bill has not stated facts sufficient to constitute a cause of action against the defendants or either of them.

Fourth. That it appears on the face of the said bill that Chapter Three hundred and forty-eight (348) of the Laws of 1910 of the State of New York is in all respects valid and in conformity with the Constitution of the United States and with the several amendments thereof.

Wherefore for these and divers other good causes of demurrer this defendant prays judgment of the Court whether he shall be compelled to answer further, and he prays to be hence dismissed with costs.

ARCHIBALD R. WATSON,
Corporation Counsel, Solicitor for the Defendant, William F. Baker, Hall of Records, Borough of Manhattan, New York City.

LEON G. GODLEY,
Of Counsel.

I hereby certify that I am of counsel for the defendant, William F. Baker, in this cause, and that in my opinion the foregoing demurrer is well founded in point of law.

LEON G. GODLEY,
Of Counsel.

31 UNITED STATES OF AMERICA,
State of New York, County of New York, ss:

William F. Baker, being duly sworn, says: That he is one of the defendants in the above entitled cause; that he has read the foregoing demurrer, and knows the contents thereof, and that the same is true in point of fact; that the same is not interposed for delay.

WILLIAM F. BAKER.

Subscribed and sworn to before me this 19th day of August, 1910.

SAMUEL P. DU BOIS,
[SEAL.] *Notary Public, Queens County.*

Certificate filed in N. Y. County.
Register's No. 2164.

32 *Opinion.*

United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY et al., Defendants.

SAMUEL KOHAN, Complainant,
against
EDWARD R. O'MALLEY et al., Defendants.

In each case motion for preliminary injunction and demurrer to complaint were argued together.

LACOMBE, *C. J.:*

These causes were argued on August 24th and the briefs reached the Court on August 27th. The sole question raised is as to the constitutionality of Chapter 348 of the Laws of 1910, which it is contended violates the Constitution of the United States; that Act goes into effect on September 1st and it is asked that a decision be rendered not later than August 31st. The briefs are voluminous with references to many authorities and the time is too short to write an elaborate opinion discussing the points involved. The arguments have been carefully considered and the more important au-
33 thorities cited have been referred to. The following brief statement of conclusions is all that can be prepared in time to accompany the decision.

1. The objection that the statute requires five years' residence in the United States is one which cannot be availed of by either of these complainants, both of whom have been residents for a much longer time.

2. As to the contention that the statute confides the issuing of a license to the arbitrary discretion of the Comptroller it is sufficient

to say that its terms may be construed either way; that is as giving such officer the power capriciously to refuse a license or as giving him the power to refuse only in the honest exercise of a reasonable discretion. In the absence of a decision by the State court of last resort construing the language of the statute it must be assumed that the latter is the correct interpretation because otherwise the Act would be unconstitutional and it must be assumed that the Legislature intended to keep its enactments within the limits fixed by the Constitution.

3rd. I am not persuaded that there is anything unreasonable in the classification based, not upon the volume of business done, but on the amount of individual transactions; there may be good reason for providing special (and) greater safe-guards for those small depositors who presumably are without sufficient means to safe-guard themselves.

4th. I am not satisfied that the business regulated by the Act is interstate commerce.

34 The motions are denied, the demurrers sustained and the Bills dismissed with costs.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Aug. 31, 1910. John A. Shields, Clerk.

35 *Order Sustaining Demurrer.*

At a Stated Term of the United States Circuit Court, Southern District of New York, Held at the Court-house Thereof, in the Post Office Building, in the Borough of Manhattan, New York City, on the 10th Day of September, 1910.

Present: Hon. E. Henry Lacombe, Circuit Judge.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

The defendants Edward R. O'Malley and Clark Williams and the defendant Frank Moss and the defendant William F. Baker having demurred to the bill of complaint herein upon the ground:

First. That the complainant has not by his said bill made such a cause as entitles him in a Court of Equity to any relief against the defendants or either of them as to the matters contained in the said bill, or any of such matters.

Second. That said bill does not contain any matter of equity whereon this Court can ground any decree, or give the complainant any relief or assistance as against these defendants or either of them.

Third. On the ground that the complainant in his said bill has not stated facts sufficient to constitute a cause of action against the defendants or either of them.

Fourth. That it appears on the face of the said bill that
36 Chapter Three hundred and forty eight (348) of the Laws of 1910 of the State of New York is in all respects valid and in conformity with the Constitution of the United States and with the several amendments thereof.

And said demurrers having come on to be heard and having been argued by counsel, and the Court having been fully advised of the premises, it is

Adjudged and decreed that the demurrers of the said defendants to the bill of complaint be and hereby are sustained, and the said bill of complaint dismissed, and that the defendants O'Malley and Williams recover of the complainant the sum of Twenty dollars ($20) costs, and that the defendant Frank Moss recover of the complainant the sum of sixty-nine 70/100 dollars ($69.70) costs to be taxed by the Clerk of this Court, and that the defendant William F. Baker recover of the complainant the *the* sum of Twenty & 10/100 dollars ($20.10) costs to be taxed by the Clerk of this Court and that the said defendants have execution therefor.

E. H. LACOMBE,
U. S. C. J.

A copy of the within paper has been this day received at the office of the Corporation Counsel.
Sep. 2, 1910.

ARCHIBALD R. WATSON,
Corporation Counsel.

DISTRICT ATTORNEY'S OFFICE.

Received Sep. 2, 1910.
Received Sep. 2, 1910.

CHAS. DUSHKIND.

U. S. Circuit Court, Southern District N. Y. Filed Sep. 10, 1910. John A. Shields, Clerk.

37 United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainants,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

Admission of Service.

Due service of a copy of the within Petition and Order allowing appeal in the above entitled cause is this day admitted.
Dated New York, September 14, 1910.

EDWARD R. O'MALLEY,
CLARK WILLIAMS,
By LOUIS MARSHALL, *Of Counsel.*
FRANK MOSS,
By ROBERT C. TAYLOR, *Solicitor.*

A copy of the within paper has been this day received at the Office of the Corporation Counsel.
Sep. 15, 1910.

ARCHIBALD R. WATSON,
Corporation Counsel.

38 United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

Petition for Appeal.

Comes now the complainant in the above entitled cause conceiving himself aggrieved by the final decree heretofore made and entered by this Court sustaining the demurrer interposed by the defendants O'Malley, Moss, Williams and Baker and dismissing the Bill of Complaint herein and having filed with the Clerk his assignment of errors and desiring to appeal from said decree to the Supreme Court of the United States prays this court to allow an appeal to the Supreme Court of the United States from said decree and that a certified transcript of the record upon which said decree was made be transmitted to said Court.
Dated, September 10th, 1910.

CHAS. DUSHKIND,
Solicitor for Complainant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Sep. 15, 1910. John A. Shields, Clerk.

39 United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

Order Allowing Appeal.

The above named complainant, Morris Engel, having presented his petition asking leave to appeal to the Supreme Court of the United States from the final decree entered in this action on the 10th day of September, 1910, sustaining the demurrer interposed by the defendants, O'Malley, Moss, Williams and Baker, dismissing the Bill of Complaint herein,
Now on motion of Charles Dushkind, Solicitor and of Counsel for the complainant, it is

Ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein sustaining the demurrer to the bill of complaint interposed by the defendants O'Malley, Moss, Williams and Baker and dismissing the Bill of Complaint herein, be and the same hereby is allowed and that the certified transcript of the record of all proceedings herein duly authenticated be forthwith transmitted to the Supreme Court of the United States, and it is further

40 Ordered that the bond on appeal be fixed at the sum of two hundred and fifty ($250) dollars as a bond for costs and damages on appeal.

Dated, September 13, 1910.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Sep. 15, 1910. John A. Shields, clerk.

41 United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

On reading and filing the annexed stipulation and on motion of Charles Dushkind, Solicitor for and of counsel with the complainant herein, it is

Ordered that the assignment of errors filed herein on behalf of the complainant on the 10th day of September, 1910 be struck from the files and omitted from the Transcript of the Record and Proceedings in this cause to be sent to the United States Supreme Court pursuant to the appeal granted herein on the 13th day of September, 1910, and that the annexed assignment of errors be filed (as the assignment of errors presented herein by and on behalf of the complainant) nunc pro tunc as of the 10th day of September, 1910.

Dated, New York, September 21, 1910.

E. HENRY LACOMBE,
U. S. Circuit Judge.

We hereby consent to the foregoing Order. Dated, New York, September 16, 1910.

EDWARD R. O'MALLEY,
CLARK WILLIAMS,
By LOUIS MARSHALL,
Their Counsel.
ARCHIBALD R. WATSON,
Corporation Counsel, Solicitor for Defendant Baker.

ROBERT C. TAYLOR,
(L. G. G.),
Solicitor for Def't Frank Moss.
CHAS. DUSHKIND,
Solicitor for Complainant.

42 United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

Assignment of Errors.

And now comes the Complainant in the above entitled cause and assigns errors in the decision and decree of the Circuit Court of the United States, Second Circuit, Southern District of New York, in the above entitled cause as follows:

First. The Court erred in sustaining the demurrer to the Bill of Complaint herein interposed by the defendants, O'Malley, Williams, Baker and Moss, and in granting and making the decree herein dismissing the Bill of Complaint.

Second. The Court erred in sustaining said demurrer and dismissing the Bill herein on the ground that the Complainant has not by his said Bill made such a cause as entitles him in a Court of Equity to any relief against the defendants or either of them as to the matters contained in said Bill or any of such matters.

Third. The Court erred in sustaining said demurrer and dismissing the Bill herein on the ground that said Bill does not con-
43 tain any matter of Equity whereon this Court can ground any Decree or give the complainant any relief or assistance as against these defendants or either of them.

Fourth. The Court erred in sustaining the demurrer and dismissing said Bill of Complaint on the ground that the complainant in his said bill has not stated facts sufficient to constitute a cause of action against the defendants or either of them.

Fifth. The Court erred in sustaining said demurrer and dismissing said Bill of Complaint on the ground that it appears on the face of the said Bill that Chapter 348 of the Laws of 1910 of the State of New York is in all respects valid and in conformity with the Constitution of the United States and with the several amendments thereof.

Sixth. The Court erred in failing to overrule the demurrer interposed herein and to grant a Decree in favor of the complainant as prayed for in the Bill of complaint herein.

Seventh. The Court erred in holding Chapter 348 of the Laws of 1910 of the State of New York valid and in conformity with the Constitution of the United States and with the several amendments thereof, because said Statute is repugnant to and violates the provisions of the Constitution of the United States and more particularly, sub-division 3 of Section 8, Article 1, thereof, and the Fourteenth Amendment of said Constitution, in that the Statute known as Chapter 348 of the Laws of 1910 of the State of New York,
44 (*a*) deprives the complainant of property without due process of law.

(*b*) denies to the complainant the equal protection of the laws,

(*c*) denies to persons including the complainant within the jurisdiction of the State of New York the equal protection of the laws,

(*d*) regulates commerce among the several states and with foreign nations and imposes a tax upon such interstate commerce and commerce with foreign nations.

In order that the foregoing assignments of error may be and appear of record the complainant presents the same to the Court and prays that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided and the complainant prays a reversal of the Decretal order and Decree of Dismissal made and entered by said Court.

Dated, New York, September 10, 1910.

CHAS. DUSHKIND,
Solicitor for Complainant.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y., Filed Sep. 21, 1910, John A. Shields, Clerk.

45 United States Circuit Court, Southern District of New York.

MORRIS ENGEL, Complainant,
against
EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS, and WILLIAM F. BAKER, Defendants.

Bond for Damages and Costs.

Know all men by these presents, That I, William Jacobus, of the City of Paterson, State of New Jersey, am held and firmly bound unto the above named defendants, O'Malley, Williams, Moss and Baker in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said defendants, for the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal and dated the 10th day of September, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named Morris Engel has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit, by the Judge of the Circuit Court of the United States, for the Southern District of New York;

Now therefore, the condition of this obligation is such, that if the above named Morris Engel shall prosecute said appeal to
46 effect and answer all damages and costs, if he fail to make good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WILLIAM JACOBUS.

Sealed and delivered and taken and acknowledged this 10th day of September, 1910, before me.

[SEAL.]

MORRIS WEISS,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

William Jacobus, being duly sworn deposes and says that he resides at No. 71 12th Avenue in the City of Paterson, State of New Jersey, and is a free holder; that he is worth the sum of five hundred ($500.00) dollars over and above all his just debts and liabilities.

WILLIAM JACOBUS.

Sworn to this 10th day of September, A. D. 1910, before me
[SEAL.] MORRIS WEISS,
Notary Public, N. Y. Co.

The within bond is hereby approved. Sept. 13, 1910.
E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Sep. 14, 1910, John A. Shields, Clerk.

47 The President of the United States to Edward R. O'Malley, Frank Moss, Clark Williams, and William F. Baker, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, District of Columbia within thirty (30) days from the date of this writ pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, Second Circuit, Southern District of New York wherein Morris Engel, is Complainant, and you are the defendants to show cause if any there be why the order and decree in the said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness: Hon. E. Henry Lacombe, Judge of the Circuit Court of the United States, Second Circuit, Southern District of New York, this 13 day of September, 1910, and the Independence of the United States One hundred and thirty fifth.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Due Service of the foregoing citation on appeal is hereby admitted. Dated N. Y. Sept. 14, 1910.

EDWARD R. O'MALLEY.
CLARK WILLIAMS.
By LOUIS MARSHALL, *Of Counsel.*
FRANK MOSS,
By ROBERT C. TAYLOR, *Solicitor.*

A copy of the within paper has been this day received at the Office of the Corporation Counsel.
Sep. 15, 1910.

ARCHIBALD R. WATSON,
Corporation Counsel.

48 [Endorsed:] Eq. 6/107. E. & A. D. 3146. United States Circuit Court Southern District of New York. Morris Engel, complainant, against Edward R. O'Malley, et als., defendants. Original. Citation. Chas. Dushkind, Solicitor for Complainant, Temple Court, 5 Beekman Street, Manhattan, New York. U. S. Circuit Court, Southern District N. Y. Filed Sep. 15, 1910. John A. Shields, clerk.

49 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to forty-eight inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Morris Engel, Complainant-Appellant, against Edward R. O'Malley, Charles Whitman, Frank Moss, Clark Williams and William F. Baker, Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and Thirty-fifth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Morris Engle, compl't-appellant, vs. Edward R. O'Malley and others, Def'ts-appellees. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,324. S. New York C. C. U. S. Term No. 703. Morris Engel, appellant, vs. Edward R. O'Malley, Frank Moss, Clark Williams, and William F. Baker. Filed September 26th, 1910. File No. 22,324.

Office Supreme Court, U. S.
FILED.
OCT 17 1910
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1910.

No. 703.

MORRIS ENGEL,

APPELLANT,

vs.

EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS AND WILLIAM F. BAKER,

APPELLEES.

AFFIDAVIT ON BEHALF OF ATTORNEY-GENERAL AND COMPTROLLER OF STATE OF NEW YORK IN FAVOR OF MOTION TO ADVANCE CAUSE FOR ARGUMENT.

EDWARD R. O'MALLEY,
Attorney-General, State of New York.

IN THE

SUPREME COURT OF THE UNITED STATES.

MORRIS ENGEL, APPELLANT,

against

EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS AND WILLIAM F. BAKER, APPELLEES.

AFFIDAVIT OF ATTORNEY-GENERAL AND COMPTROLLER IN FAVOR OF ADVANCING CAUSE FOR ARGUMENT.

STATE OF NEW YORK,
COUNTY OF ALBANY, } *ss.:*

Edward H. Letchworth, being duly sworn, deposes and says:

I am Second Deputy Attorney-General of the State of New York, and have had personal supervision and charge of this case on behalf of the Comptroller and the Attorney-General since its inception. It is extremely important for the proper and orderly administration of the offices of the Comptroller and of the Attorney-General, and for the public welfare of the State of New York, that the questions pre-

sented in this cause be passed upon by this Court as soon as possible.

The complainant seeks an injunction to prevent the defendants from enforcing the provisions of chapter 348, Laws of 1910, State of New York, known as the "Private Banking Act," by which private individuals are prohibited from engaging in the business of receiving deposits of money from small depositors unless they first give the Comptroller of the State security, and conform to the other provisions of the act prerequisite to the issuance of a license. The ground upon which this relief is sought is the alleged unconstitutionality of this statute. The Circuit Court rendered judgment in favor of the defendants, holding the law valid and dismissing the bill.

Since this decision of the Circuit Court, the Supreme Court of New York State, in an action brought by other complainants against these same defendants to secure similar relief, has held that this statute is unconstitutional, and has granted an injunction against its enforcement. The confusion which these conflicting decisions will cause and is causing in the administration of the governmental machinery of the State, particularly in the offices of the Comptroller and of the Attorney-General, as well as in the city of New York and its governmental departments, makes it imperative that this Court pass upon the questions without delay. Until they have been finally determined by this tribunal, the enforcement of this law, which was passed by the State of New York to regulate the indiscriminate carrying on of the business of banking by private individuals, and to protect the thousands of small depositors who have shown their inability to protect themselves, will, of necessity, be erratic and unfair. The suspension of the law as to some will be unfair to those others who have complied with its terms, and its application will be attended with uncertainty and doubt on the part of the officers charged with enforcing it, the individuals obligated to obey it, and the general public ostensibly protected

by it. The resulting confusion cannot but cause serious harm, both to an orderly and just administration of government and to public confidence in the stability of this important part of the financial fabric of the country.

EDWARD H. LETCHWORTH.

Sworn to before me, this 14th
day of October, 1910.

M. VINCENT RYAN,
Notary Public in and for Albany County, N. Y.

Office Supreme Court, U. S.
FILED
OCT 17 1910
JAMES H. McKENNEY,
Clerk.

No. 703.

SUPREME COURT OF THE UNITED STATES.

MORRIS ENGEL,

Appellant,

against

EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,

Appellees.

MOTION TO ADVANCE.

CHARLES DUSHKIND,
Counsel for Appellant.

LOUIS MARSHALL,
Counsel for Appellees,
Edward R. O'Malley and Clark Williams.

ROBERT C. TAYLOR,
Counsel for Appellee, Frank Moss.

ARCHIBALD R. WATSON,
Corporation Counsel of the City of New York,
Counsel for Appellee, William F. Baker.

APPEAL PRINTING COMPANY, 32-34 VESEY STREET, NEW YORK.

Supreme Court of the United States.

MORRIS ENGEL,
Appellant,

against

EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,
Appellees.

Statement of Matters Involved and the Reasons for the Application to Advance.

The question involved in this appeal is as to whether a certain statute enacted by the legislature of the State of New York and known as Chapter 348 of the Laws of 1910, is repugnant to the United States Constitution or not.

The statute in question attempts to regulate the business of private banking and also the business of transmitting money for clients to the different states and to foreign countries. A certain license tax is imposed and certain bonds and securities are required to be deposited. This suit was instituted by the appellant to declare the statute unconstitutional and to enjoin the state authorities from enforcing same. It is contended by the appellant that the statute is obnoxious to the 14th amendment of

the constitution of the United States and to the commerce clause thereof because

(a) It deprives a person residing in the United States less than 5 years of the right to continue to carry on such business.

(b) It gives the absolute power to the State Comptroller to refuse to grant a license even though the applicant had complied with all the requirements of the law.

(c) It exempts people of the same class and engaged in the same line of business from the operation of the law if their deposits during the preceding year averaged $500 for each account.

(d) It regulates interstate and foreign commerce and imposes a tax thereon.

The Court below sustained the demurrer to the complaint holding that the statute does not violate the provisions of the constitution.

Reasons for This Application.

As to the reasons for this application it may be best to quote from the affidavit of Louis Marshall, Esq., special counsel for the Attorney General of the State of New York and the State Comptroller submitted herewith:

> By reason of this litigation and the publications resulting therefrom, the idea has gone forth among those engaged in private banking that until there is a decision on this appeal by this Court, the Law will not be enforced. I am informed and believe that there are at least one thousand private bankers within the City of New York who are subject to the provisions

of this act. But a small percentage of them have thus far complied with the act, a large proportion of those coming within its provisions deferring action until this Court has finally passed upon the constitutionality of the act.

It is, therefore important, in the interests of the administration of this salutary legislation, that there be a speedy hearing of this appeal. If the hearing should not take place except in the usual course, then it will be necessary for the State to institute hundreds of criminal proceedings at great expense, and under conditions of serious annoyance, all of which would be avoided if this Court should speedily hear and determine this appeal.

On behalf of the Attorney General and the State Comptroller, I therefore unite in the application of the appellant to have this cause advanced and set for hearing on as early a day as is practicable.

I may also add that there are in the State of New York at least one thousand individuals or firms engaged in the business of private banking and also of transmitting money to foreign countries for their clients, and the statute in question not only affects this large number of banking concerns, some of whom, as the complainant for instance, have been engaged in that business for over twenty years, but all stockbrokers who accept deposits from their clients which is the usual custom with brokers are subject to the provisions of the same statute. It is claimed that more than one-half of those concerns would be compelled to liquidate and cease their operations as a result of that law. Millions of dollars are constantly held on

deposit by these brokers and bankers and a forced liquidation of so many institutions at the same time is likely to cause considerable commercial distress and thousands of depositors are likely to suffer as a result thereof. This business had heretofore practically been unregulated by any statute of the State of New York and it is claimed that the statute in question is not alone unconstitutional, but is unfair and unreasonable and would work unjust discriminations between the people engaged in the same class of business.

Chas Denby Jr
Counsel for appellants

Supreme Court of the United States.

MORRIS ENGEL,
Appellant,

against

EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,
Appellees.

Sirs:

Please take notice, that upon the annexed affidavits of Charles Dushkind, Esq., verified the 7th day of October, 1910, and Louis Marshall, Esq., verified the 10th day of October, 1910, a motion will be made at a stated term of the Supreme Court of the United States to be held in the City of Washington, District of Columbia, on Monday, October 17, 1910, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for an order advancing this cause and setting it down for argument upon a day certain,

and for such other and further relief as may be just and proper in the premises.

Dated, New York, October 10th, 1910.

Yours, etc.,

CHARLES DUSHKIND,
Counsel for Appellant,
5 Beekman Street,
Borough of Manhattan,
New York City.

To

Louis Marshall, Esq.,
Counsel for Appellees,
Edward R. O'Malley and Clark Williams.

Robert C. Taylor, Esq.,
Counsel for Appellee,
Frank Moss.

Archibald R. Watson, Esq.,
Counsel for Appellee,
William F. Baker.

SUPREME COURT OF THE UNITED STATES. 7

MORRIS ENGEL,
Appellant,

against

EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,
Appellees.

8

United States of America,
Southern District of New York, } ss.:

Charles Dushkind, being duly sworn, deposes and says: I am counsel for the appellant herein. This is an appeal from a final decree sustaining a demurre to the bill of complaint herein. This suit was brought in the United States Circuit Court for the Southern District of New York for the purpose of obtaining a decree declaring and adjudging a statute passed by the Legislature of the State of New York, and known as chapter 348 of the Laws of 1910, and approved by Governor Hughes, now Mr. Justice Hughes of this Court, as 9
unconstitutional, and enjoining the defendants who are respectively the Attorney-General and the State Comptroller of the State of New York, and the District Attorney and Police Commissioner of New York County, from enforcing the same.

The statute in question attempts to regulate the business of private banking and of transmitting money to foreign countries. It prohibits the car-

10 rying on of the business of receiving deposits of money for safe keeping or for the purpose of transmission to another or for any other purpose after September 1st, 1910, without first obtaining a license from the State Comptroller.

> "Before receiving such license the applicant therefor shall file with the comptroller a written statement in the form to be prescribed by the comptroller and verified by the individual or members of the firm making the application, showing the amount of the assets and liabilities of the applicant, designating the place where the applicant proposes to en-
11 gage in business, that the applicant has been, or if the applicant shall constitute a partnership, that a majority of the members thereof having a controlling interest in the business of such partnership have been continuously for a period of five years immediately preceding the date of such application resident in the United States."

As a condition for the granting of such a license the statute requires that the applicant shall deposit with the Comptroller the sum of $10,000 in money or its equivalent, and in addition thereto a bond of a surety company for a sum to be
12 fixed by the Comptroller which shall not be for less than $10,000 nor more than $50,000. But even after complying with these requirements the Comptroller may in his discretion approve or disapprove the application in the following language:

> "After notice of the application shall have been so posted for a period of 2 weeks he (the

comptroller) may in his discretion approve 13
or disapprove the application."

The law also requires such licensees to make reports from time to time to the Comptroller as to their assets, liabilities, etc., and the licenses thus granted are revocable by the Comptroller. Certain penalties are prescribed for failing to comply with the law. Under Section 27, the carrying on of such business without a license is made a misdemeanor which under the law of the State is punishable by a fine of $500 or an imprisonment of 1 year or both, and a failure to make reports is under Section 29 punishable by a penalty of $100 for every day that such report be delayed or 14
withheld.

The statute furthermore exempts certain classes and certain individuals from the operation thereof in Section 29d which provides as follows:

"The foregoing provisions shall not apply (1) to any corporation or individual banker authorized to do business under the provisions of the Banking Law nor to any association organized under the National Banking Act, nor to (2) any hotel keeper who shall receive money for safe keeping from guests, nor (3) to any express or telegraph company receiving money for transmission, nor (4) to 15
any individual or partnership receiving money on deposit for safe keeping or for transmission to others or for any other purpose where the average amount of each sum received on deposit or for transmission by such individual or partnership in the ordinary course of business during the fiscal year preceding the dates of the affidavit hereinafter specified

16 shall not be less than $500.00 * * * nor (5) to any individual or partnership, etc., who shall file with the Comptroller a bond in the sum of $100,000.00 approved by the Comptroller etc., in cities having a population of over one million and $50,000.00 if conducted elsewhere."

It is contended by the appellant that the statute is repugnant to the Constitution of the United States, and particularly to the commerce clause and also the Fourteenth Amendment and the most objectionable features of the Statute relied upon by the appellant are as follows:

17 (a) The provision that deprives a person residing in the United States less than 5 years of the right to continue to carry on such business.

(b) The provision that gives the absolute power to the State Comptroller to refuse to grant a license even though the applicant had complied with all the requirements of the law.

(c). The clause that exempts people of the same class and engaged in the same line of business from the operation of the law if their deposits during the preceding year averaged $500 for each account.

18 (d) The provisions that regulate interstate and foreign commerce and the impositions of a tax upon same.

There are in the State of New York at least one thousand individuals or firms engaged in the business of private banking and also of transmitting money to foreign countries for their clients, and the statute in question not only affects this large number of banking concerns, some of whom, as

the complainant for instance, have been engaged 19
in that business for over twenty years, but all stock brokers who accept deposits from their clients which is the usual custom with brokers are subject to the provisions of the same statute. It is claimed that more than one-half of these concerns would be compelled to liquidate and cease their operations as a result of that law. Millions of dollars are constantly held on deposit by these brokers and bankers and a forced liquidation of so many institutions at the same time is likely to cause considerable commercial distress and thousands of depositors are likely to suffer as a result thereof. This business had heretofore 20
practically been unregulated by any statute of the State of New York and it is claimed that the statute in question is not alone unconstitutional but is unfair and unreasonable and would work unjust discriminations between people engaged in the same class of business.

The statute became a law on May 23rd last and this suit was instituted in August and on August 31st the Court below has handed down its decision, and on September 10th the assignment of errors has been filed and on September 13th the order allowing this appeal and the citations were granted and on the 26th day of September the record was duly filed and docketed in this Court, 21
being No. 703 on the docket for the October term, 1910.

In the regular course this cause is not likely to be reached for argument until the Fall of 1911, and I respectfully pray that in view of the large interests involved in this matter and of the thousands, if not hundreds of thousands of depositors that are likely to be affected by reason of the statute and the general effect that the enforce-

ment of the law is likely to have upon commerce in general in the State of New York and in view of the interest of the general public in this matter that this cause be advanced and that it be set down for a day certain at as early a date as practicable.

CHAS. DUSHKIND.

Sworn to before me this 7th day of October, 1910.

George Lambert,
Notary Public,
Westchester Co.

[SEAL.]

Certificate filed in New York Co.

SUPREME COURT OF THE UNITED STATES.

MORRIS ENGEL,
Appellant,

against

EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,
Appellees.

United States of America,
Southern District of New York, } ss.:

Louis Marshall, being duly sworn, deposes and says: I am special counsel in the above cause for the appellees, Edward R. O'Malley, who is the Attorney General of the State of New York, and Clark Williams, who is the Comptroller of

the State of New York. The nature of this litigation and of the constitutional questions therein involved, is correctly stated in the affidavit of Mr. Dushkind, the counsel for the appellant. 25

The act of the Legislature of the State of New York the constitutionality of which is challenged, is Chapter 348 of the Laws of 1910, entitled, "An act to amend the General Business Law in relation to private banking, and to repeal Article Ten thereof relating to ticket agents."

The passage of this act was recommended by the Commission on Immigration appointed pursuant to Chapter 310 of the Laws of 1908, for the purpose of investigating the various abuses to which immigrants and aliens in the State of New York were subjected. It was found that a large number of private banks had been organized, which received Millions of dollars of deposits from the poorest members of the community, and that in many cases, through the fraud, ignorance and incompetency of these private bankers, these depositors lost Millions of dollars annually; that there was no adequate regulation of the business of these private bankers, and that they were all under serious temptation to defraud those dealing with them. 26

This act went into effect on September 1, 1910, but before that date this action was instituted against the Attorney General of the State of New York, the Comptroller of the State of New York, the District Attorney of New York County, and the Commissioner of Police of the City of New York, to restrain the enforcement of this legislation, on the alleged ground of its unconstitutionality. 27

The defendants demurred to the bill of com-

28 plaint and the demurrer was sustained and judgment directed in favor of the defendants.

By reason of this litigation and the publications resulting therefrom, the idea has gone forth among those engaged in private banking, that until there is a decision on this appeal by this Court, the law will not be enforced. I am informed and believe that there are at least one thousand private bankers within the City of New York who are subject to the provisions of this act. But a small percentage of them have thus far complied with the act, a large proportion of those coming within its provisions deferring action until this Court has
29 finally passed upon the constitutionality of the act.

It is, therefore, important, in the interests of the administration of this salutary legislation, that there be a speedy hearing of this appeal. If the hearing should not take place except in the usual course, then it will be necessary for the State to institute hundreds of criminal proceedings at great expense, and under conditions of serious annoyance, all of which would be avoided if this Court should speedily hear and determine this appeal.

On behalf of the Atorney General and the State Comptroller, I therefore unite in the application
30 of the appellant to have this cause advanced and set for hearing on as early a day as is practicable.

LOUIS MARSHALL.

Subscribed and sworn to before me this 10th day of October, 1910.

Edward M. Neary,
[NOTARIAL SEAL.] Notary Public,
Kings County.
Certificate filed in New York County.

SUPREME COURT OF THE UNITED STATES. 31

MORRIS ENGEL,
Appellant,

against

EDWARD R. O'MALLEY, CHARLES WHITMAN, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,
Appellees.

32 Due and timely service of the annexed papers and notice of motion is hereby admitted.

Dated, New York, October 10th, 1910.

LOUIS MARSHALL,
Counsel for Appellees,
Edward R. O'Malley and Clark Williams.

ROBERT C. TAYLOR,
Counsel for Appellee,
Frank Moss.

ARCHIBALD R. WATSON,
Corporation Counsel,
Counsel for Appellee,
William F. Baker. 33

Office Supreme Court, U. S.
FILED.
NOV 30 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 703.

MORRIS ENGEL,

Appellant,

against

EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER,

Appellees.

BRIEF AND ARGUMENT FOR APPELLANT.

CHARLES DUSHKIND,
Counsel for Appellant,
5 Beekman Street,
New York City.

APPEAL PRINTING COMPANY, NEW YORK.

Supreme Court of the United States.

MORRIS ENGEL, Appellant, against EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER, Appellees.	October Term, 1910. No. 703.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of the Case.

This is an appeal from a final decree sustaining the defendants' demurrer to the bill of complaint and dismissing the complaint. The suit was instituted in the United States Circuit Court for the Southern District of New York for the purpose of obtaining a decree declaring and adjudging a statute passed by the Legislature of the State of New York, and approved by Governor Hughes, now Mr. Justice HUGHES of this Court, and known as Chapter 348, Laws of 1910, as unconstitutional and enjoining the defendants who are, respectively, the Attorney General and the State Comptroller of the State of New York, the Acting District Attorney and

the Police Commissioner of the County of New York from enforcing the same. Three separate demurrers have been interposed, one on behalf of the defendants O'Malley and Williams, appellees (Rec., p. 14), and one on behalf of each of the defendants Moss and Baker, appellees (Rec., pp. 16 and 17). The grounds set forth are alike in all three demurrers.

After a final hearing these demurrers were sustained and a final decree was entered by the Court below sustaining the demurrers and dismissing the complaint (Rec., p. 19), and from that order this appeal has been taken.

Facts.

The complainant alleges in substance that he is now and for about twenty years last past, has been engaged in the business of receiving deposits of money from various persons for the purpose of transmission; that during that time he has succeeded in building up an excellent reputation; that his business has become very profitable and the good will thereof has become and is very valuable; that by reason of his long experience and good reputation in said business the complainant has succeeded in building up a good business of receiving deposits from various persons for the purpose of transmission to others in states other than the State of New York, and in foreign countries for which he receives certain commissions, percentages or profits, yielding him considerable income from time to time; that his firm has also been receiving deposits of money from such parties for safe-keeping, it being customary for such depositors to make deposits in exceedingly small sums from time to

time until their deposits aggregate a certain amount, sufficient to be transmitted.

That the complainant is a citizen of the United States; that he had gone to considerable expense in building up his trade and custom, and that he has invested in said business considerable sums of money.

The complainant then sets forth the enactment of Chapter 348 of the Laws of 1910, and the provisions therein contained and alleges that said statute is violative of the Constitution of the United States. He further alleges that his main business consists of transmission of moneys to foreign countries and that he is engaged in interstate commerce and commerce with foreign nations; that he cannot possibly comply with the requirements of the statute, because he has not the means to deposit the required security and that the defendants whose duty it is to enforce the statute have threatened to enforce same against complainant and to prosecute him if he should continue to carry on his business in violation thereof; that he would be subjected to continuous and repeated punishments, fines and penalties, etc., that he would be deprived of his valuable property rights, etc., and that he has no remedy at law.

He prays that the statute be declared unconstitutional and that the defendants be restrained, etc., from enforcing same against the complainant (Rec., pp. 2-8).

Four separate grounds were set up in the demurrers, to wit:

First: That the complainant has not made such a cause as entitles him in a Court of Equity to any relief; *second*: That the bill does not contain any matter of equity whereon the Court can ground any decree or give the complainant any

relief or assistance; *third*: That the complainant has not stated facts sufficient to constitute a cause of action; *fourth*: That it appears on the face of the said bill that Chapter 348 of the Laws of 1910 of the State of New York is in all respects valid and in conformity with the Constitution of the United States and with the several Amendments thereof.

The statute is printed in full on pages 9-14 Record, but the provisions involved herein may be briefly set forth as follows:

> "Sec. 25. No individual or partnership shall hereafter engage directly or indirectly in the business of receiving deposits of money for safekeeping or *for the purpose of transmission to another* or for any other purpose in cities of the first class without having first obtained from the comptroller a license to engage in such business. Before receiving such license the applicant therefor shall file with the comptroller a written statement in the form to be prescribed by the comptroller and verified by the individual or members of the firm making the application, showing the amount of the assets and liabilities of the applicant, designating the place where the applicant proposes to engage in business, that the applicant has been, or if the applicant shall constitute a partnership, that a majority of the members thereof having a controlling interest in the business of such partnership *have been continuously for a period of five years immediately preceding the date of such application resident in the United States*" (Rec., p. 9).

As a condition for the granting of such a license the statute requires that the applicant shall deposit with the comptroller the sum of $10,000 in money or its equivalent and in addition thereto

a bond of a surety company for the sum to be fixed by the comptroller which shall not be for less than $10,000 nor more than $50,000. *But even after complying with these requirements the comptroller may in his discretion approve or disapprove the application in the following language*:

> "After notice of the application shall have been so posted for a period of 2 weeks he (the comptroller) may in his discretion approve or disapprove the application" (Rec., pp. 9 and 10).

The law also requires such licensees to make reports from time to time to the comptroller as to their assets, liabilities, etc., and the licenses thus granted are revocable by the comptroller. Certain penalties are prescribed for failing to comply with the law. Under Section 27, the carrying on of such business without a license is made a misdemeanor which under the law of the state is punishable by a fine of $500 or an imprisonment of 1 year or both, and a failure to make reports is under Section 29 punishable by a penalty of $100 for every day that such report be delayed or withheld.

The statute furthermore exempts certain classes and certain individuals from the operation thereof in Section 29d which provides as follows:

> "*The foregoing provisions shall not apply* (1) to any corporation or individual banker authorized to do business under the provisions of the Banking law nor to any association organized under the National Banking Act, nor to (2) any hotel keeper who shall receive money for safe keeping from guests, nor (3) to any express or telegraph company receiving money for transmission, nor (4) *to any individual or partnership receiving money*

on deposit for safe keeping or for transmission to others or for any other purpose where the average amount of each sum received on deposit or for transmission by such individual or partnership in the ordinary course of business during the fiscal year preceding the dates of the affidavit hereinafter specified shall not be less than $500.00 * * * nor (5) to any individual or partnership, etc., who shall file with the Comptroller a bond in the sum of $100,000.00 approved by the Comptroller etc., in cities having a population of over one million and $50,000.00 if conducted elsewhere" (Rec., p. 13).

Errors Relied Upon.

Seven errors have been assigned for this appeal (Record, p. 23), but they are practically all embodied in the seventh assignment of error, to wit: That the Court erred in holding Chapter 348 of the Laws of 1910 of the State of New York valid and in conformity with the Constitution of the United States and with the several amendments thereof because said statute is repugnant to and violates the provisions of the Constitution of the United States, and more particularly, Subdivision 3 of Section 8, Article I thereof, and the fourteenth amendment of said Constitution, in that the statute known as Chapter 348 of the Laws of 1910 of the State of New York

(a) deprives the complainant of property without due process of law.

(b) Denies to the complainant the equal protection of the law.

(c) Denies to persons including the complainant within the jurisdiction of the State of New York, the equal protection of the laws.

(d) Regulates commerce among the several States and with foreign nations, and imposes a tax upon such interstate commerce and commerce with foreign nations.

The most objectionable features of the statute which we contend are obnoxious to the Constitution of the United States are as follows:

(a) The provisions that deprives a person residing in the United States less than 5 years of the right to carry on such business.

(b) The provision that gives the absolute power to the State Comptroller to refuse to grant a license even though the applicant had complied with all the requirements of the law.

(c) The clause that exempts people of the same class and engaged in the same line of business from the operation of the law if their deposits during the preceding year averaged $500 for each account, or if they deposit a bond of $100,000 in cities of one million population, or $50,000 in other cities.

(d) The provisions that regulate interstate and foreign commerce and the impositions of a tax upon same.

Before entering upon a discussion of the questions of law involved it would not be out of place to refer briefly to the character of the business the statute is directed against and in this connection it may be best to quote from the report of the Commission of Immigration upon whose recommendation this very statute was enacted.

From Report of Commission of Immigration.

"The large number of banks now under consideration is due to the character of the present immigration. The English, Irish, German and Scandinavian immigrant, * * * Ignorance of the English language and of American laws and customs among many of the more recently arrived Italians, Hungarians, Jews, Poles, Russians, Croatians, Slovaks, Greeks and Syrians has apparently given rise to these banks which especially minister to some of the primary needs of these newly arrived aliens. Hence these institutions have been called upon to do more than a banking business. The banker not only accepts deposits and transmits money to Europe, but maintains a post-office at which mail may be called for, or from which it may be forwarded, sells steamship tickets, etc. * * * He advises his client as to employment, introduces him to lodging-house keepers, attends to the correspondence of the illiterate, acts as interpreter, arbitrator, and becomes the custodian of documents, valuables and baggage, and renders many other gratuitous services. * * * The clerk in an ordinary bank neither could or would perform the numerous little, but to the alien essential, offices to which reference has been made."

"In an interview the official in charge of the registry department in the New York post-office ascribes the comparatively limited use of the post-office facilities by the aliens to the following reason: (1) He is not educated up to the use of the post-office, because he is often illiterate, and cannot fill out the necessary blanks. The post-office does not render assistance because it cannot assume the responsibility of writing names and addresses as pronounced by foreigners, which might lead to errors and complications and liability

on the part of the post-office clerks. (2) Salaries paid to post-office employees are not high enough to attract men able to speak foreign languages, and the force is not large enough to enable the department to detail employees for this special work. (3) Branch offices close at 8 o'clock in the evening. To keep them open for the accommodation of the alien whose working hours prevent him from utilizing the post-office at an earlier hour would require the attendance of the branch superintendent, since the money received would not be entrusted to a minor official who has not given the statutory bond. (4) Post-offices in small towns do not issue foreign money orders, and the alien being ignorant of the fact that he can, nevertheless, through the postmaster at New York transmit his money abroad, does not utilize the privilege."

The purpose and usefulness of these agencies are thus clearly and correctly stated by the Immigration Commission but exception must be taken to their reference to these institutions as "Banks" or to the concerns as "Bankers." These people are not "Bankers" nor are they doing banking business in the true sense of the word. Their business consists of selling steamship tickets and forwarding moneys for foreigners to their relatives or friends abroad for which they receive a certain commission or percentage. As an incident, however, to the transmission business their customers frequently deposit in such offices small and insignificant sums of money from week to week for safe keeping until they accumulate a sufficient sum of money to be transmitted to their families or to purchase a steamship ticket when the savings are accordingly converted and this is the extent of their banking business.

Hundreds of such offices have been in existence in every large city of the United States from the very time that immigrants began to come here and the same is true in other countries that people emigrate to. In sections populated largely by immigrants these institutions are as much a part of their daily wants as are the grocery stores. Many of the people engaged in that line of business have spent their lifetime in it. The complainant, for instance, has been in this business for over 20 years. This statute simply legislates the great majority of them out of business, for the conditions imposed are so harsh that they cannot possibly be complied with. *Under the statute any one engaged in the business of receiving money for transmission must deposit the minimum amount of $20,000 in cash or its equivalent irrespective of the amount of business transacted.* For the average concern engaged in the business of selling steamship tickets and transmitting moneys such requirements are entirely uncalled for and are simply prohibitory.

Not speaking of the constitutionality of the law the Court will readily see that the statute is arbitrary, unfair and unreasonable. An applicant for a license to carry on such business must in the first instance deposit at least $20,000.00 in cash or its equivalent regardless of the question as to the extent of his business; the applicant's whole business of transmitting money may not amount to $5,000.00 per annum and yet he would be required to deposit at least $20,000.00 in cash or its equivalent which is the minimum amount of the security.

Even after complying with these conditions and depositing the money or security the Comptroller may in his discretion approve or disapprove the

application and grant or refuse such license without any cause, or justification whatever, so that a man having been engaged in that business for years may thus be forced out of it by the Comptroller arbitrarily even though he is willing to put up the security, and moreover the wealthier class of people engaged in the same business, that is, those whose deposits average $500.00 each, are absolutely exempt from the operation of that law, as none of the provisions of that law applies to them, and the same is true in respect to those who are able to file a bond for $100,000.00; as to them the law does not apply.

The line of business involved in this suit depends largely upon trust, confidence and credit and the least attack made against a firm engaged in that line is sufficient to ruin their credit and to destroy the value of their business; it is therefore absolutely necessary for the protection of their rights that they may not be deprived of their property and driven out of business without due process of law, that they have injunctive relief from a court of equity, for to wait until they would be arrested or until actions or suits would be instituted against them under that Statute, and to await the decisions of the State Courts as to the validity of the law would surely afford them no relief, but on the contrary, their business would be absolutely ruined and destroyed in the meantime; any action on the part of the State authorities to enforce that law would create considerable distrust among the customers for whom these agencies have at all times numerous transmissions of money in the course of delivery and this is likely to subject them to a multiplicity of suits and prosecutions of all characters. There can be no adequate remedy at law in such

case. The complainant cannot possibly deposit the minimum amount of $20,000 required as a condition for obtaining a license and hence he must either close up his business that he had spent his lifetime in building up, or subject himself to arrest and imprisonment and to any number of suits and litigations which would ultimately drive him out of business.

What remedy can a citizen thus wronged have if he could obtain no relief from the federal courts? To quote the language of the U. S. Supreme Court in Proutt vs. Starr, 188 U. S., 537, in speaking of the rights of individuals under the Constitution which rights the Court says "would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State Laws disregarding these constitutional limitations."

After the lower court had rendered the decision in this suit, another suit was instituted by one Lee in the Supreme Court of this State against the same defendants, wherein the same relief, that is injunction, was prayed for and wherein the same objections to statute were raised. Upon a motion for a preliminary injunction Mr. Justice BIJUR, holding Special Term of the court, in a lengthy opinion which is subjoined as *Appendix* I, held the statute unconstitutional and granted an injunction.

An appeal was thereafter taken to the Appellate Division of the Supreme Court, resulting in a reversal of the order granted by Mr. Justice BIJUR, the Appellate Division holding that a court of equity would not grant any injunctive relief to restrain the enforcement of a statute, but the Court declined to pass upon the constitutionality of the Act:

"We decline to pass upon the constitutionality of the act, says the Court, for we are convinced that no cause of action is stated of which a court of equity has jurisdiction."

POINT I.

Actions to restrain State officials from enforcing statutes that are unconstitutional may be properly maintained in the Federal Courts of Equity.

The question of jurisdiction of a court of equity to grant relief in such cases has been passed upon by this Court so frequently and so recently that an extended discussion would seem to be entirely uncalled for. Nor do we think that appellee's counsel will even seriously urge that point in view of the recent decisions of this Court. But in view of the decision of the Appellate Division in the Lee case we may be pardoned for indulging in few references to the cases decided by this Court on this point.

The leading cases we rely upon are:

Smyth vs. Ames, 169 U. S., 466.
Proutt vs. Starr, 188 U. S., 537.
Ex parte Young, 209 U. S., 123.
Willcox vs. Gas Co., 212 U. S., 19.
Ludwig vs. Western Union, 216 U. S., 146.
Western Union vs. Andrews, 216 U. S., 165.
Herndon vs. Chi., etc., Ry. Co., 218 U. S., 135.

In Willcox vs. Gas Company, *supra*, the Supreme Court has said:

> *"That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law, brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied."*
>
> "It involves the constitutionality, with reference to the Federal Constitution, of two acts of the legislature of New York, and it is one over which the circuit court undoubtedly had jurisdiction under the act of Congress, and its action in taking and hearing the case cannot be the subject of proper criticism."

In Proutt vs. Starr, *supra,* the Supreme Court has said:

> "But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the state of Nebraska, and is in contravention of the 11th Amendment of the Constitution of the United States."

It is a sufficient answer to this contention that it was made, considered and determined in Smyth vs. Ames, *supra.* In the opinion in that case it was said:

> "Within the meaning of the 11th Amendment of the Constitution, the suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced, without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment."

"It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as attorney general of the state of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney general of a state cannot be restrained by an injunction of a United States court from enforcing the criminal laws of the state.

This, we think, is only another phase of the same question.

It is true that the defendant was included in the bill as the attorney general of the state, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against *the valid criminal laws* of the state, but its object was to prevent him from collecting penalties that had accrued under the provisions of the *statute judicially determined to be void.*"

In the latest case involving this point, to wit, In *Ex parte* Young, *supra*, decided by this Court in 1909, an Attorney-General had been restrained from enforcing an unconstitutional law in relation to railroad rates. He violated the injunction and was punished for contempt. He contended that the federal court had not jurisdiction because the suit was really against a state and furthermore that the Court could not enjoin the prosecutions of criminal proceedings. The Supreme Court overruled both points. The Court after reviewing numerous authorities said:

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in respect

to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

The Young case has been followed by this Court in:

Ludwig vs. Western Union, 216 U. S., 146.

Western Union vs. Andrews, 216 U. S., 165.

Herndon vs. Chicago, etc., Ry. Co., 218 U. S., 135.

In the Lee case argued before the Appellate Division the case of

Fitts vs. McGhee, 172 U. S., 516,

was urged as authority for the contention that a court of equity has no jurisdiction to enjoin the enforcement of a criminal statute.

In the opinion written by Mr. Justice PECKHAM in the Young case, the distinction between the Fitts v. McGhee case and the other cases herein cited, where such jurisdiction was upheld, is clearly pointed out. The difficulty in the Fitts case was because the state officer who was made defendant in that suit had nothing to do with the enforcement of the statute as stated by the Court on page 158.

"The officers in the Fitts case occupied the position of having no duty at all with regard to the act and could not be properly made parties to the suit for the reason stated."

And also on page 157:

> "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officers must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state and thereby attempting to make the state a party.
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases it is true, the duty of enforcement has been so imposed (154 U. S., 362, 366, 19 of the act) but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is especially created by the act itself, is not material so long as it exists."

POINT II.

The provision that deprives persons residing in the United States less than 5 years of the right to carry on such business violates the Fourteenth Amendment of the Constitution.

Under the statute licenses to carry on the business in question can be granted only to those who shall have resided at least 5 years within the United States, so that any one now engaged in this business who has resided in the United States less than 5 years immediately preceding the date of his application, is absolutely barred from con-

tinuing therein and he is thus deprived of property without due process of law.

In Yick Wo v. Hopkins, 118 U. S., 356, the Supreme Court has held that:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. * * * These provisions are universal in their application *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. * * * The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the Court."
>
> "The rights of the petitioners as affected by the proceedings of which they complain are not less because they are aliens and subjects of the Emperor of China."

Moreover even a citizen may be barred from engaging in this business by reason of that provision. A citizen may go to some other country and reside there for a year and upon his return to the United States he would be disqualified from obtaining a license to carry on such business, for he had not been "continuously for a period of five years immediately preceding the date of such application a resident in the United States." (Section 25, p. 9, Rec.)

A citizen may have resided in some foreign country and returned to the U. S. about three years ago when he engaged in the private banking business. He would be compelled to retire. He is not qualified to obtain a license under that law.

It will be remembered that the law applies even

to those already engaged in the business. A citizen may have carried on an extensive banking business in New York while residing in some foreign country where he likewise carried on a similar business, he would be compelled to close up his New York office because he is unqualified under the statute.

Banking business is inherently lawful and a statute that would thus deprive citizens, not speaking of aliens, of their right to engage in such business or to continue such business if already engaged therein does not seem to be within the spirit of our constitution, and I doubt very much as to whether even appellees' counsel will seriously contend that this provision is constitutional.

The point has been raised that the requirement as to 5 years' residence does not apply to complainant because he admits that he has been a resident in the United States for more than five (5) years and hence he has no cause to complain. It is contended that a statute cannot be attacked by any one unless he is within the class affected by the statute in question and a number of cases have been cited in support of this proposition and the Court below sustained this contention by holding that:

> "The objection that the statute requires five years' residence in the United States is one which cannot be availed of by either of these complainants, both of whom have been residents for a much longer time."

This view does not seem to be supported by the authorities. What the authorities hold is that one who attacks a statute must be within the class affected by the statute as a whole but he need not

necessarily be affected by the particular vice that renders the statute defective. According to the defendant's contention one who does not happen to be affected by the particular vice that makes the statute void would have no remedy against such enactments even though it would impose unmeasured burdens upon him.

A statute that is repugnant to the constitution is not *voidable but is absolutely void* as has been said in the case of

Norton v. Shellby County, 118 U. S., 441.

> "An unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never passed."

In *ex parte* Young, 209 U. S., 129, Mr. Justice PECKHAM, says on pages 159, 160:

> "The act to be enforced is alleged to be unconstitutional and if it be so the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not effect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution the officer in proceeding under such enactment comes into conflict with the superior authority of that constitution and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsi-

bility to the supreme authority of the United States."

An unconstitutional act is rendered void not by judicial decision but the constitution itself declares it void. It is self operating; it has no legal inception and never has a legal existence. Thus this Court said in the case of

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 558:

"The nullity of any act inconsistent with the constitution is produced by the declaration that the Constitution is the supreme law."

If such statute, as we have seen, is void and has no legal existence would a person be obliged to carry the burdens it imposes upon him because the particular vice that renders it void does not affect him? Would he have to pay taxes or lose some valuable property rights or go to jail under a void statute without being heard to complain because the particular provision that makes the statute void does not apply to him?

Applying this reasoning the appellees would have the appellant pay the tax, procure a license, deposit $20,000 security and file reports or suffer the penalty of the law under a void statute and he would have no standing in court because the five years' residence does not apply to him.

It would seem to be the more reasonable rule that anyone against whom an unconstitutional act is sought to be enforced, should have the right to resist its enforcement and attack the validity of the act no matter whether the obnoxious feature of the law applies to him or not.

And this seems to be the rule laid down in

Tyler v. Judges, 179 U. S., 405.
Hooker v. Burr, 194 U. S., 415.
Turpin v. Lemon, 187 U. S., 51.
William v. Eggleston, 170 U. S., 304.
Hatch v. Reardon, 204 U. S., 152.
Albany County v. Stanley, 105 U. S., 305.
Southern Pacific R. R. Co. v. King, 217 U. S., 534.

the cases relied upon by appellees.

Moreover in the case at bar the act is properly before the Court. The 5 years' residence is not the only provision that is claimed to be repugnant to the Constitution. In respect to the other objectionable provisions the complainant is directly affected and it is respectfully submitted that the statute being properly before the Court all of the obnoxious features may be properly urged for consideration.

POINT III.

The statute is unconstitutional because it gives the Comptroller arbitrary power to deprive the appellant of his right to carry on his business.

Section 25 of the act also provides (Rec., p. 10):

> "After notice of the application shall have been so posted for a period of two weeks *he may in his discretion approve or disapprove the application,*"

so that the statute gives the absolute power to the State Comptroller to refuse to grant such

license without cause even though the applicant had complied with all the requirements of the statute. Such provision has been condemned in Yick Wo v. Hopkins, 118 U. S., 356.

In that case an ordinance prohibiting the carrying on of a laundry business without having first obtained the consent of the Board of Supervisors, etc., was held unconstitutional, the Court stating:

> "*They seem intended to confer, and actually do confer,* not a discretion to be exercised upon a consideration of the circumstances of each case, but *a naked arbitrary power to give or withhold consent,* not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon this case, it would be sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. *The power given to them is not confided to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.*"
>
> "The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise

of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

"But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' *For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*"

In the same case the Supreme Court quoted with approval the language in Baltimore vs. Radecker, 49 Md., 217, nullifying an ordinance giving the power to a city officer to notify any one employing a steam engine in the City of Baltimore to cease to do, as follows:

"But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, and by pro viding compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that City practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action

It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; *and, when we remember that his action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to de detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power,* for that becomes apparent to every one who gives to the subject a moment's consideration. *In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."*

The case at bar is precisely like the case of Yick Wo. In the Yick Wo case the Supervisors had the absolute power to refuse a license without cause and so in the case at bar the State Comptroller is given the absolute power to refuse a license without any cause and the same reasoning should apply.

A statute giving the Mayor the power to grant or refuse a license was upheld in

Gundling v. Chicago, 177 U. S., 183,

but under the statute in that case the Mayor could only refuse a license if he was satisfied that the applicant was an unfit person or of a bad character, the Court stating:

"The Mayor is bound to grant a license to

> every person, fulfilling these conditions and thus the fact of fitness is submitted to the judgment of the officer and it calls for the exercise of a discretion of a judicial nature by him."

The rule laid down in the Yick Wo case is reaffirmed in the Gundling case.

But it is contended by appellee's counsel that while the language of the statute may vest the comptroller with arbitrary power, it would not be construed that way by the courts and that until there shall be such construction by the State Court the statute cannot be attacked on that ground and this contention was sustained by the court below (p. 19 Rec.).

It is argued that this court has so held in the Yick Wo case and the Gundling case *supra.*

The Yick Wo case came up before this Court upon a Writ of Error to the State Court of California where the plaintiff in error had been convicted and imprisoned for carrying on a laundry without a permit under an ordinance that gave the board of supervisors the absolute power to grant or refuse to grant such permits. It was not an appeal for the purpose of reviewing the construction placed upon the ordinance by the state court, nor was the conduct of the board of supervisors in refusing to grant such a license under the ordinance directly before this court for consideration. The main question in that case was whether or not the provision granting the board such arbitrary power was obnoxious to the 14th Amendment of the Constitution. It is true that the conduct of the state authorities in arbitrarily refusing to issue licenses to so many Chinamen was severely criticized by this court, but I take it that this was only

by way of illustrating the evils that a power of this character is likely to produce and did in fact produce in that case, but it was the ordinance itself that was declared repugnant to the constitution.

According to defendants' theory the only remedy the complainant would have would be to wait until the Comptroller would refuse to grant him a license and then to apply to the Courts to review the Comptroller's action and in the meantime to close up his office and ruin his business.

The statute gives the Comptroller the absolute power in this respect and it does not even contain any suggestion as to the facts or circumstances upon which his discretion is to be exercised. In business of this character it would seem that such discretion if exercised would be based upon the financial responsibility of the applicant for such license, but Section 29e precludes such supposition. If not the financial responsibility of the applicant what are the circumstances or facts that the Comptroller is to consider in exercising that discretion? What rules of law are to govern his action in such matter? To quote from the opinion of the Supreme Court in the Yick Wo case *supra:*

> "It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented."

If this provision is unconstitutional the complainant should not be compelled to wait until his business would be closed up and ruined before applying to the Court for relief.

If the defendants' contention that a statute of this character is not in itself objectionable and can only be attacked by a party after he had made an application and had been arbitrarily refused be

sound we would have a situation where the circumstances in each particular case would have to be inquired into in order to determine whether the action of the officer in refusing to grant such license amounted to an abuse of power or not. Surely, the court could not declare a statute unconstitutional merely because the officer in question had abused his power in a given case, and so assuming that a Mr. Jones had made an application which had been unjustly and arbitrarily rejected and in which case the officer had clearly abused his power the court could not for that reason set aside the act for should some other person then attack the statute by showing that Mr. Jones had been arbitrarily refused a license the answer would be: True, that the officer had abused his power in the Jones case but he may act otherwise in your case, and so applying this reasoning the statute would forever remain in force and we would only have a multiplicity of suits for each case would depend upon the circumstances connected therewith; for what may be arbitrary action in one case may be perfectly proper in another.

It is respectfully submitted that the better rule would seem to be to consider only the language of the statute and not as to whether the officer in question had abused his power as was said by this Court in the Yick Wo case:

> "So that if an applicant for such consent being in every way a competent and qualified person and having complied with every reasonable condition demanded by any public interest should failing to obtain the requisite consent of the supervisors to the prosecution of his business apply for redress by the judicial process of mandamus to require the supervisors

> to consider and act upon his case it would be a sufficient answer for them to say that the law had conferred upon them authority to withold their assent without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

Might not the same thing be said concerning the statute involved in the suit at bar? Is there any distinction between the power granted to the comptroller in the suit at bar and the power granted to the supervisors in the Yick Wo case? When this provision is read together with Section 29-e which precludes the comptroller from inquiring into the financial responsibility or solvency of the applicant, this case would seem to be stronger than the Yick Wo case.

In the Gundling case *supra*, the Court simply expressed a doubt as to whether or not the complainant could attack the validity of the ordinance on the ground of the arbitrary power vested in the Mayor before making an application for such a license and being refused.

> "It seems somewhat doubtful, says Mr. Justice Peckham, whether the plaintiff-in-error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power to the mayor to grant or refuse."

Notwithstanding this expression the Court nevertheless proceeded to consider the validity of the ordinance in question and no positive rule has been laid down in that case, nor in any other case as far as we know that an arbitrary clause of this character cannot be attacked unless the complain-

ant had first made an application for a license or privilege and had been refused.

The ordinance in the Gundling case has been held constitutional by this Court because as pointed out by Mr. Justice Peckham it does not confer arbitrary power upon the Mayor like the ordinance that had been held unconstitutional in the Yick Wo case for in the Yick Wo case the board had absolute and arbitrary power to refuse a license without giving any reasons as in the case at bar, while in the Gundling case the Mayor was simply given the authority to decide as to whether the person applying is of good character and reputation.

> "The Mayor is bound to grant a license to every person fulfilling these conditions says Mr. Justice Peckham, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him."

In other words everyone being a person of good character and reputation is absolutely entitled to the license. In the case at bar like in the Yick Wo case the character or reputation of the applicant need not be taken into consideration by the comptroller. The power to grant or refuse a license is simply arbitrary and such a license may be refused even though the character and reputation of the applicant be beyond question.

Taking into consideration the character of the business we are dealing with in this case it would seem that the responsibility or solvency of the applicant would be proper subjects for investigation by the comptroller in order to exercise his arbitrary power, but Section 29-e of the Statute expressly precludes the comptroller from making such investigations in this language.

> "Nothing in this article contained shall be construed to require the comptroller to make any inquiry or examination as to the responsibility or solvency of any applicant for a license or of any licensee hereunder."

If the solvency or financial responsibility of the applicant is not to be taken into consideration by the comptroller in exercising his power what rule of conduct is he to be governed by in the use of that discretion?

The different health laws are urged by the defendants in justification of this power. But to make the health cases analogous those statutes should read that the health board may grant or refuse a permit in their discretion but they shall not consider the public health in acting upon such application.

The case mainly relied upon by the defendant is that of

> People *ex rel.* Lieberman v. Van de Carr, 199 U. S., 552.

The question involved in that caes is whether an ordinance granting the Board of Health power to issue permits to sell milk was violative of the Fourteenth Amendment of the Constitution. The ordinance read, Section 66:

> "No milk shall be received, held, kept, either for sale or delivered in the city of New York without a permit in writing from the Board of Health and subject to the conditions thereof."

In the first place this was an ordinance relating eo the public health and there is no analogy between such ordinances and statutes regulating ordinary business affairs. In the second place, the

statute involved in the case at bar expressly provides that the Comptroller may in his discretion approve or disapprove such application, while the ordinance in the Liberman simply grants the Board the power to prescribe conditions upon which such a license will be issued, and once these conditions are prescribed everyone complying with same would undoubtedly be entitled to a permit. The ordinance does not in express terms permit the Board to grant a license to one and refuse to another in its discretion, as does the statute, in the case at bar, and so Mr. Justice DAY in delivering the opinion of the Court upholding the ordinance said:

> "The right of the state to regulate such occupations which may become unsafe or dangerous when unrestrained in the exercise of the police power with a view to protect the public health and welfare has been so often and so recently before this Court that it is only necessary to refer to some of the cases which sustained the proposition that the state has a right by reasonable regulations to protect the public health and safety."

In speaking of the meaning of the statute, Mr. Justice DAY said:

> "Such regulations, however, should be uniform and the Board should not act arbitrarily and if this section of the sanitary code vested in them arbitrary power to license one dealer and refuse a license to another similarly situated it would be invalid."

In the statute now under consideration such arbitrary power is expressly granted to the Comptroller.

The Court further said in the Lieberman case:

> "We do not so understand the decision of the highest Court of New York. As we read it the authorities sustained in the grant of power to issue or withold permits in the honest exercise of reasonable discretion."

There is thus a broad distinction between the ordinance in the Lieberman case and the statute in the case at bar, and it is respectfully submitted that the views expressed by this Court in the Lieberman case should not be extended to apply to the case at bar, in which entirely different principles are involved.

POINT IV.

The statute is repugnant to the Fourteenth Amendment, because it contains unjust discriminations.

In Section 29d of the statute certain classes are exempted from the operation of that law, which may be passed on without criticism but there are two exemptions that, we think, unquestionably renders the statute void. In addition to the exemption of certain classes, it exempts certain bankers or individuals belonging to one and the same class depending only upon the amount of business transacted. Thus under Subdivision 4 of that section individuals or co-partnerships whose deposits during the preceding year have averaged more than $500 for each deposit or who are able to file a bond in the sum of $100,000 are exempt from the operation of the law.

This is not an exemption or privilege in favor of certain classes, but it is a discrimination between people belonging to the same class. All bankers are one class and all those engaged in the business

of transmitting money are one class. To use the language of this Court in Cotting vs. Godard, 183 U. S., 79, *"It appears that a classification is attempted between those doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes."* Such law is clearly repugnant to the Constitutional provision in the 14th Amendment providing for the equal protection of the law.

The case of Cotting vs. Godard, 183 U. S., 79, is in every respect analogous with the case at bar. In that case a statute regulating the charges to be made by stock yards for handling cattle and applying only to stock yards "which for the preceding 12 months shall have had an average daily receipt of not less than 100 head of cattle or 300 head of hogs or 300 head of sheep" and exempting all other stock yards, was held unconstitutional as violating the 14th Amendment by denying equal protection of the law, the Court stating:

> "The act in terms applies only to those stock yards within the state 'which for the preceding twelve months shall have had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep.' "
>
> "Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes."
>
> "If the average daily receipts of a stock yard are more than 100 head of cattle, or more than 300 head of hogs, or more than 300 head

of sheep, it comes within the purview of this statute. If less than that amount it is free from legislative restriction. No matter what yards it may touch to-day or in the near or far future, the express declaration of the statute is that stock yards doing a business in excess of a certain amount of stock shall be subjected to this regulation and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered."

"The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron, of this Court, when in Vanzant v. Waddel, 2 Yerg., 262, 270, he said:

> 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'"

"*No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government.*"

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations, *we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business*

and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. *If once the door is opened to the affirmance of the proposition that a state may regulate one who does such business while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost*, and the door is opened to that inequality of legislation which Mr. Justice CATRON referred to in the quotation above made. *This statute* is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but *is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If the legislation does not deny the equal protection of laws, we are unable to perceive what legislation would.* We think, therefore, that the principle of the decision of the supreme court of Kansas in State v. Haun, 61 Kan., 149, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

Is there any distinction between the statute involved in the Cotting case and the one now under consideration in respect to the exemptions referred

to? The answer must be in the negative. In the Cotting case stock yards whose average daily receipts during the preceding 12 months were less than 100 heads of cattle were exempted. In the case at bar individuals whose deposits during the preceding 12 months have averaged more than $500 are exempted. The same reasoning should therefore apply to this case.

> "But a statute would not be constitutional which should prescribe a class or a party for opinion's sake, or which should select particular individuals from a class or locality.
>
> Cooley Const. Law, 556, 557.

Exemption of real estate dealers and contractors whose business does not amount to $1,000 per annum from operation of an ordinance imposing a license tax unconstitutional.

> Corn v. Clark, 195 Pa., 634; 57 L. R. A., 348.

A statute requiring persons before practicing osteopathy to study 4 years, etc., while not requiring equivalent preparation of those practicing according to other schools of medicine is unconstitutional.

> State v. Gravette, 65 Ohio, 289.

> "Arbitrary selection can never be justified by calling it classification."

In Connolly vs. Union Sewer Pipe Co., 184, U. S., 540, the Court said:

> *"The State has undoubtedly the power to protect the public morals, the public health and public safety, but if by their necessary operation its regulations looking to either of*

those ends amount to a denial to persons of the equal protection of the laws they must be deemed unconstitutional and void."

Magon vs. Ill. Trust, etc., Co., 170 U. S., 283.

American Sugar Ref. Co. vs. Louisiana, 179 U. S., 89.

In support of appellants' contention that the discrimination complained of in the case at bar is sustained by the authorities, they refer to quite a number of decisions where various classifications have been upheld. These cases may be divided into five classes, to wit:

1. Classifications in liquor cases.

2. Territorial classifications.

3. Classifications in respect to the learned professions.

4. Classifications in respect to health laws.

5. Classifications in respect to taxation.

The principles in neither of these classes of cases can be applied in the case at bar.

The right to engage in the banking business is a common law right belonging to individuals and to be exercised at their pleasure, and while we concede the right of the state to regulate the business of banking we must nevertheless assert that the business is inherently a lawful business that may be carried on by anyone subject only to such reasonable regulations as may be provided by statute. It has no relation to public health nor to public morals, and there is indeed a wide distinction between the banking business and the occupa-

tions where public health or public morals is involved.

Thus in the case of Butchers Union vs. Crescent City, 111 U. S., 746, Mr. Justice FIELDS said on page 757:

> "The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves and have been followed in all communities from time immemorial, *must therefore be free in this country to all alike upon the same terms.*"

See, also,

Bank of Augusta, 2 Earl, 13 Peters, 51c.

The business of private banking had not only been unregulated by statute heretofore but the legislature had even gone to the extent of expressly recognizing that business and placing private bankers on an equality with National Banks. Thus we find that in Section 302, Chapter 409, Laws of 1882, being the "Codification of Banking Laws" the Legislature defined "private bankers" as follows:

> "'Private banker' denotes persons engaged in banking *without having special statutory privileges.*"

The term "private Banker" has been used in the same sense in

Ch., 236, Laws 1888,

and in

1 Rev. Stat., 712, Sec. 6.

In the same statute of 1882, the Legislature has placed private Bankers on an equality with National Banks without attempting in any way to reg-

ulate their business, and in Perkins vs. Smith, 116 N. Y., 441, the New York Court of Appeals, said:

> "The right to engage in banking is a common law right."
>
> * * * * * * *
>
> "Private Bankers are persons or firms engaged in banking *without having any special privileges or authority from the state.*"

Can this be said concerning the right to sell liquors or the right to practice law or the right to practice medicine or the right to sell poisons or other articles injurious to health?

In

Austin v. Tennessee, 179 U. S., 343,

Mr. Justice BREWER, in discussing the various state statutes restricting the sale of liquors that were held constitutional under the police power of the state to preserve public health, safety and morals, says:

> "These cases recognize the fact that intoxicating liquors belong to a class of commodities which, in the opinion of a great many estimable people are deleterious in their effects, demoralizing in the tendencies, etc."

The question of restricting the sale of cigarettes was involved in this case and the same principles were applied as in the sale of liquors or oleomargarine.

In

Crowley v. Christensen, 137 U. S., 86,

Mr. Justice FIELD, in distinguishing the case of Yick Wo v. Hopkins, from the liquor cases, says:

> "It will thus be seen that that case was essentially different from the one now under con-

> sideration, the ordinance there held invalid vested uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community—*In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited* or subjected to such restrictions as the governing authority of the city may prescribe."

As to the learned professions, Judge COLLEY says:

> "No one has any right to practice law or medicine except under the regulation of the state may prescribe. * * * The privilege may be given to one sex and denied to the other and other discriminations equally arbitrary may doubtless be established."
>
> Colley, pp. 289, 290.

And so appellees endeavor to justify the classification based upon the amount of business upon the strength of the decisions wherein graded tax laws were upheld. But there is no analogy between the case at bar and the tax cases. A state may well impose a tax of $100 upon one whose business amounts to $10,000 per annum and only $50 upon one whose business amounts to $5,000 per annum. But it is one thing to tax merchants upon the volume of their business and it is quite another thing to say that all merchants in a particular line whose business amounts to less than $10,000 per annum shall pay a license tax, file reports, deposit securities and be under government supervision or close up their shops while all those whose business amounts to $10,001 or more need not pay any tax nor file any reports nor deposit

any securities and they may transact their business as they see fit as stated by this Court in

Connolly v. Union Sewer Pipe Co., *supra.*

"A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. * * * A state may in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. *But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade.*"

* * * * * *

"In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis,

> is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

In the case at bar the question involved is whether the state has a right to subject those whose deposits average less than $500 to the drastic requirements of the statute and permit those whose deposits averages $501 or more to conduct their business as they please by exempting them altogether from the provisions of the law. We are not dealing with a graded tax law based upon the amount of business but we are dealing with a statute that places burdens upon one whose business is small and exempts the other engaged in the same business because the volume of his business is larger.

In the Cotting case, *supra,* where this very question was involved this Court has expressly held that a classification that depends upon the extent of one's business is void,

> "but, says the Court, it is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. *If such legislation does not deny the equal protection of laws we are unable to perceive what legislation would.*"

No stronger language could be used.

Counsel for the defendant in the Brief submitted in the lower Court said:

> "Thus, for instance, to place the Italian banker in the same class with J. P. Morgan & Company or any other of the great private bankers of New York would be an absurdity."

If it is permissible under our system of Government to distinguish between the Italian banker

and J. P. Morgan why not exempt Mr. Morgan and all other bankers whom the Legislature sought to exempt by their proper names, but such exemption would be regarded as a violent abuse of legislative power and if such is the law can the Legislature effect the same purpose by exempting these gentlemen by the amount of business that they are doing?

But there is another important point to be considered in connection with this question. The one who complies with the law and obtains a license *which he is required under the law to hang up in a conspicuous place* (Record, p. 10), is thus compelled to give public notice that he belongs to the "small class"; to the class that cannot be trusted as is claimed; that his business is carried on on a small scale while his neighbor whose deposits last year had averaged $500 need not have such license and the absence of such license is evidence of his good standing, of his trustworthiness and of his financial responsibility.

Defendants place great reliance upon the decision of the New York Court of Appeals in the Musco v. United Surety Co. case, 196 N. Y., 459. In the first place the decision of this Court in the case of Cotting v. Godard, *supra*, disposes of that question and moreover there was no discrimination within the same class in the Musco case. The statute in that case exempted certain corporations, etc., but the law applied equally to all individuals engaged in the same business. In that case there was a proper classification, while in this case there is a discrimination within the same class.

The Musco case was an action instituted against the surety company to recover upon the bond filed by the company under the Wells Law by one who had deposited money with the concern for the pur-

pose of transmission and which had not been transmitted. The surety company defended the suit on the ground that the law was unconstitutional, alleging three separate grounds to wit: 1st. Because it is an unjustifiable interference with the rights of citizens to carry on a legitimate business. 2nd. Because it unjustly discriminates between members of the same class since it exempts steamship companies or their authorized agents from the operation of the statute and 3rd, Because it violates the commerce laws. And the Court of Appeals said on page 463:

> "We are of the opinion that these contentions cannot prevail; that in the first place the appellant is debarred from making them; and secondly that the objections even if available to it could not be sustained."

And on page 464 the Court said:

> "If the principal could and did waive any question of constitutionality of the act the appellant cannot raise such question for certainly its position as a surety for a consideration is not any stronger than that of its principal."

It will thus be seen that the main question involved in that case was as to whether a surety upon a bond filed pursuant to a statute the unconstitutionality of which had been waived by the principal for whom the bond had been filed can interpose the defense that the statute was unconstitutional if he had executed the bond for a consideration.

The Court, nevertheless, proceeded to consider the constitutionality of the statute and expressed its opinion that the law was constitutional. But there is a great distinction between the Wells law involved in the Musco case and the statute in question in this case. In the Musco case the statute

exempted drafts, money orders and travelers checks issued by trans-Atlantic steamship companies or their duly authorized agents and as was said by the Appellate Division in considering the same case:

> "National banks are regulated by Federal laws and state banks and trust companies by the laws of the state; all tending to insure honest dealings with customers and safety in money transactions. A Trans-Atlantic steamship company * * * is under the Maritime law under stringent liability. The legislature had the right to say that National and state banks and trust companies and Trans-Atlantic steamship companies needed no further regulation for the purpose of guarding against fraud and embezzlement."

The Court also held:

> "The buying of a draft or money order is not strictly speaking the same as receiving money for transmission."

It will thus be seen that there is a marked distinction between the exemptions in the statute involved in the Musco case and those involved in the case at bar.

Hostile discriminations against any class thus singled out has been repeatedly condemned by this Court.

Thus in

> Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania, 125 U. S., 181

this Court said:

> "The Constitutional inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class from

being singled out as a special subject of hostile or discriminating legislation."

In

Gulf, Col. etc. R. R. Co. v. Ellis, 165 U. S., 150, 153

the Court said:

"But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payments of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, *or all men possessed of a certain wealth.* These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In

Connolly v. Union Sewer Pipe Co., *supra*,

the Court stated:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this Court, were not included in the grants of power to the

general government and therefore were reserved to the states when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' *The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.*"

* * * * * * *

"For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th. Amendment forbids this * * * No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

POINT V.

Circumstances and conditions that led to the enactment of the law cannot be considered on the question as to the constitutionality of the law.

Great stress has been laid by defendants' counsel upon the deplorable conditions that exist in the private banking business showing the necessity for drastic legislation. The necessity for legislation can form no justification for passing an unconstitutional law. And in determining whether a statute is valid or invalid, the Court cannot investigate and take into consideration the circumstances that led the Legislature to pass that law.

Numerous authorities are cited by defendants' counsel on the proposition that the Court may consider such circumstances and it may also examine legislative documents in passing upon a law. This is true, but not for the purpose of determining the question of constitutionality of the law. The exigencies which led to the passage of an act as well as legislative records may be examined in order to place a proper construction upon the statute, in order to determine its true meaning. But as to whether the law violates any constitutional provision must be determined from the statute itself, regardless of the intent of the legislative body or of the conditions that led to such legislation.

In

Doyle vs. Cont. Ins. Co., 94 U. S., 535,

this Court has said:

"If the act done by the state is legal, is not in violation of the constitution or laws of the United States, it is quite beyond the power of any Court to inquire what was the intention of those who enacted the law."

* * * * * *

"In all the cases where the legislation of a state has been declared void such legislation (decision) has been based upon the Act or fact which was itself illegal."

* * * * * *

"In all these cases it was the Act or fact complained of that was the subject of judicial inquiry, and upon the act was the judgment pronounced."

"Debates and proceedings in constitutional convention are not admissible to control the construction of the plain language of the constitution, or narrow down the powers which that instrument confers."

Legal Tender Cases, 12 Wall 457.

"While the spirit of the Constitution is to be respected no less than its letter, that spirit is to be collected from its words, and neither practice nor intrinsic circumstances can control its clear language."

Sturges v. Crowinshield, 4 Wheat., 122.

Again the attention of the Court must be directed to the fact that the complainant is not and never has been a banker and while there may be just grounds for drastic legislation in respect to the business of private banking, the situation is entirely different in the business of transmitting money. In that branch of the business the complainant merely acts as agent or messenger for the consignor of the money, and that branch of the business is sufficiently regulated and protected by the penal code that would render the complainant

guilty of larceny if he would misappropriate such fund.

Moreover, a simple analysis of the figures contained in the report of the Immigration Commission does not seem to justify any serious apprehension. The situation disclosed by those figures is by no means alarming and does not call for any drastic legislation.

The commission has tabulated a schedule showing twenty-six failures between September 1st, 1907 and September 1st, 1908, with aggregate liabilities of about $1,500,000 and assets of about $300,000. But among these twenty-six concerns there were 12 with less than $10,000 of liabilities, one with liabilities of $787.00 and they are all classified by the commission as bankers.

The Court will surely take notice that that was the year of the panic when a large number of regularly incorporated banks have closed their doors. Anyone of the large number of banks that have failed during that year had more liabilities than all these twenty-six so-called private bankers together. When it will be remembered that the private banking business had practically never been regulated by statute and considering the large number of such concerns that are in existence and the unlimited amount of money always on deposit, we cannot but come to the conclusion that the record far from giving cause for unusual alarm is rather a very satisfactory one. Fourteen failures under such circumstances as compared with the larger number of failures of the regularly chartered institutions is rather insignificant, I believe. I say fourteen failures because 12 out of the twenty-six concerns classified by the Commission as bankers, are probably butchers or grocerymen for manifestly a man with $787 liabilities, is not a banker, nor one with $1,100 liabilities.

According to the report of the Commission there are over 1,000 of such banks, fifty out of which have handled $16,419,821.10 in 1907, for transmission alone, that is five per cent. of the bankers have handled over Sixteen million dollars in 1907, and the aggregate amount of the failures during the panic year was only about $1,500,000.

POINT VI.

The statute is violative of the commerce clause of the Constitution because it attempts to regulate Interstate and Foreign commerce.

While the title of the Act in question refers only to "private banking" it attempts to regulate mainly the business of transmitting moneys. Banking and transmitting moneys are two separate and distinct businesses. One need not necessarily be a banker in order to be engaged in the business of transmitting money. The Court will undoubtedly take judicial notice of the fact that there are hundreds if not thousands of concerns selling steamship tickets and railroad tickets and transmitting moneys for clients. They are not bankers. The complainant in the case at bar is just engaged in that kind of a business. He is not and never has been a banker.

His business consists of transmitting money to other states and foreign countries for a fixed fee or compensation as he alleges in the Bill and we assert that in this respect he is engaged in interstate and foreign commerce.

The statute in question in Section 25 (p. 9 Rec.) attempts to regulate the "receiving of deposits of

money for safe keeping or *for the purpose of transmission to another*" and in Section 29c (p. 13 Rec.) it expressly regulates the transmission of moneys to foreign countries. This is clearly an attempt to regulate interstate or foreign commerce.

In Mobile County v. Kimball, 102 U. S., 691, 702 (26, 238, 241), the Supreme Court defined interstate commerce in the following language:

> "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation *and transit of persons and property*, as well as the purchase, sale and exchange of commodities."

Pomeroy, in his work on Constitutional Law, Section 378, referring to the signification of the word "commerce" says:

> "It includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may therefore be regulated."

It will perhaps be contended that inasmuch as Congress has failed to legislate on the subject the States may properly legislate in respect thereto but this is not the law.

In Cooley on Constitution Law, 7th Ed., p. 688, we find the following rule:

> "If Congress has made no express regulations with regard to such commerce its in-

action is equivalent to a declaration that it shall be free. The states, therefore can enforce no regulations which make foreign or interstate commerce subject to the payment of tribute to them."

In Leisy vs. Hardin, 135 U. S., 100, the Supreme Court says:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution."

"And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property, so situated, *yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action.* Citing: Henderson vs. New York City, 92 U. S., 259; Hannibal & St. J. R. Co. vs. Husen, 95 U. S., 465; Walling vs. Michigan, 116 U. S., 446; Robbins vs. Shelby County Taxing Dist., 120 U. S., 489."

"Inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it shall be free and untrammeled. Citing: Mobile County vs. Kimball, 102 U. S., 691; Brown vs. Houston, 114 U. S., 622, 631; Wabash, St. L. & P. R. Co. vs. Illinois, 118 U. S., 557; Robbins vs. Shelby County Taxing Dist., 120 U. S., 489, 493."

In Wabash St. Louis R. R. vs. Ill., 118 U. S., 557, the Court says:

> "This clause, giving to Congress the power to regulate commerce among the States, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. Cook vs. Pennsylvania, 97 U. S., 574 (Bk. 24, L. ed., 1018); Brown vs. Maryland, 12 Wheat., 446 (25 U. S., bk., 6, L. ed., 688). And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

The statute in this case not only attempts to regulate interstate commerce but it imposes a tax by way of a license fee as a condition for carrying on the business of transmitting moneys to foreign countries.

> "In Brown vs. Maryland, 12 Wheat., 419, 441, it was held that a license fee of fifty dollars, required by the State of an importer before he should be permitted to sell imported goods, was unconstitutional, as coming directly in conflict with the regulations of Congress over commerce."
>
> "So a tax on the amount of an auctioneer's sales was held inoperative so far as it applied to sales of imported goods made by him in the original packages for the importer."
>
> Cook vs. Pennsylvania, 97 U. S., 566.

A tax upon receipts from the transportation of goods from one State to another by rail is bad.

Case of State Freight Tax, 15 Wall, 232;
Fargo v. Michigan, 121 U. S., 230.

So is one upon the gross receipts from transportation by sea between different States, or to and from foreign countries.

Phila. S. S. Co. v. Pennsylvania, 122 U. S., 326.

And so is a tax upon gross receipts of car companies derived from interstate business bad.

State v. Woodruff, &c., Co., 114 Ind., 155.

So is a privilege tax upon cars used as instruments of interstate commerce bad.

Pickard v. Pullman, &c., Co., 117 U. S., 34.

And so is the tax upon the capital stock of a foreign ferry corporation engaged in such commerce which lands and receives passengers and freight within the State unconstitutional.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.

And so is one on all telegraph messages sent out of a State void.

Telegraph Co. v. Texas, 105 U. S., 460.
Ratterman v. W. U. Tel. Co., 127 U. S., 411.

Agents engaged in selling railroad tickets are engaged in interstate commerce.

McCall vs. People of the State of California, 136 U. S., 104.

A Telegraph Company engaged in transmitting messages out of a state is engaged in interstate commerce.

Telegraph Co. v. Texas, 105 U. S., 460.
Ratterman v. W. U. Tel. Co., 127 U. S., 411.
Leloup v. Port of Mobile, 127 U. S., 640.

Shipping newspapers from New York to Texas is a transaction of Interstate commerce,

Preston v. Finley, 27 Fed. Rep., 850, 857;

also shipment of books from one state to another.

In re Nichols, 48 Fed. Rep., 164;
In re White, 43 Fed. Rep., 914;
Culberson v. American T. & B. Co., 107 Alabama, 457.

In International Text Book Co. vs. Pieg, 217 U. S., 93, this Court said:

> "Referring to the constitutional power of Congress to regulate commerce among the states and with foreign countries, this court said in the Pensacola case, just cited that 'it is not only the right but the duty of Congress to see to it that intercourse among the states and *the transmission of intelligence* are not obstructed or necessarily encumbered by state legislation."

This principle has never been modified by any subsequent decision of this Court.

The same thought was expressed in

Western Union Tel Co. v. Pendleton, 122 U. S., 347, 356,

where the Court said:

> "Other commerce deals only with persons, or with visible and tangible things But the tele-

graph transports nothing visible and tangible; it carries only ideas, wishes, orders, and *intelligence.*"

It was said in the Circuit Court of Appeals of the Eighth Circuit, speaking by Judge SANBORN, in

Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. Rep., 1, 17, that:

"All interstate commerce is not sales of goods, importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importations, whether it be of goods, persons, or information, is a transaction of the interstate commerce."

A State may not exact, as a condition of doing business, a license from a company, a large part of whose business is the transmission of interstate telegrams.

Leloup v. Port of Mobile, 127 U. S., 640.

Railroad corporation engaged in interstate commerce may send its agent into any State there to secure such commerce to his principal, and the State cannot exact of him a license fee for the transaction of such business.

McCall v. California, 136 U. S., 104.

In that case a law requiring a license for an agent to sell railroad tickets was held unconstitutional.

In the case of Robins v. Taxing Dist., 120 U. S., 489, a license upon drummers engaged in soliciting orders for their firms in other states was held unconstitutional.

In Leloup v. Port of Mobile, *supra*, this Court said:

> "Where a telegraph company is doing the business of transmitting messages between different states, and has accepted and is acting under the telegraph law passed by Congress July 24, 1866, no State within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business.
>
> *"Telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different States, are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of state regulations, except such as are strictly of a police character; and any state regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void."*
>
> "A general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional."

In Wabash, St. Louis R. R. v. Illinois, 118 U. S., 557, this Court said:

> "In the case of Telegraph Co. v. Texas (*supra*), the court held that 'A telegraph Company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods'; and that 'both companies are instruments of commerce, and their business is commerce itself.' And relying upon the case of the State Freight Tax (*supra*) already referred to, the court said that a tax by the State of Texas upon all messages carried within its borders was forbidden by the commerce clause of the Constitution, as being a tax upon commerce among the States."

As already pointed out the statute in the case at bar imposes a license tax upon those engaged in transmitting money; it also attempts to regulate that business and requires the filing of certain reports and the depositing of certain securities and in Section 29c it expressly refers to foreign commerce and attempts to regulate it, and also provides a penalty, etc.

And surely one engaged in transmitting money from one state to another or from the United States to foreign countries must be regarded as engaged in interstate commerce.

The statute in question in Section 29c, as already shown, expressly attempts to regulate the transmission of money to foreign countries. It also imposes conditions upon those engaged in that business such as the depositing of securities, making reports, etc. Moreover it imposes a tax upon those engaged in this business in the form of a license fee in the sum of $50.

That a license fee is a tax has been held in

> Gundling v. Chicago, 177 U. S., 183, 189.
> Royall v. Virginia, 116 U. S., 572, 579,

and in many other cases.

In Gundling v. Chicago, *supra*, the Supreme Court has said:

> "The payment required as preliminary to the license is in the nature and form of a tax. It is an occupation tax for which the license is merely a receipt, and not an authority."

The complainant in this suit, as already stated, is not a banker, his business consists almost exclusively of transmitting money to foreign countries. He had a good cause of action therefore

when the State threatened to prosecute him for carrying on that business. His complaint was good and he was entitled to the injunctive relief demanded. As to the foreign commerce carried on by the complainant, this statute was clearly violative of his constitutional rights.

Counsel for appellees contend with great force that banking is not interstate commerce. Of course the business of banking is not interstate commerce but the statute under consideration does not regulate the banking business. It is a misnomer, we claim, to call it "private bankers' act." What the statute does regulate is:

> "Receiving deposits of money for safe-keeping or for the purpose of transmission—or for any other purpose."

People may receive deposits of money for safe keeping or for transmission without doing banking business. Express and telegraph companies receive money for transmission without doing banking business. Stock brokers receive deposits of money from their clients without doing banking business. Lawyers very often receive deposits of money from clients for safe keeping or other purposes and they are not bankers. Hospitals are receiving moneys from patients for safe keeping. Public bath houses receive money from bathers for safe keeping. Steamship companies and railroad companies receive moneys from travelers for safe keeping and many other instances may be cited where moneys are received for safe keeping without doing banking business. They would all be guilty of a crime under this statute.

There is nothing in this statute relating to banking business. There is nothing said therein about

discounting bills, issuing drafts, making loans, keeping reserve funds or any of the other features of banking business, and it will be observed that the licenses are to be obtained from and the reports are to be filed with the State Comptroller and not the Banking Department. And, moreover, the solvency or financial responsibility of a licensee is not to be considered under the statute.

This statute, therefore, does not regulate the banking business, and is not directed against bankers. Its sole object is to control and regulate the business of transmitting moneys to foreign countries, and as such it is clearly violative of the commerce clause of the Constitution.

As was said by Mr. Justice DAY in the case of Southern Rway. Co. v. King, *supra:*

> "It has been frequently decided in this Court that right to regulate interstate commerce is by virtue of the Federal Constitution exclusively vested in the Congress of the United States. This state cannot pass any law directly regulating such commerce, attempts to do so have been declared unconstitutional in many instances and the exclusive power in Congress to regulate such commerce is uniformly maintained."

The transmission of money is not a mere incident to complainant's business. According to his complaint which is admitted by the demurrer his main business is transmission of money to foreign countries, and as we have seen the statute expressly regulates that class of business in Section 29-c, while in Section 25 it prohibits the carrying on of the business of receiving money for transmission, etc.

POINT VII.

The decree of the Court below should therefore be reversed.

All of which is

Respectfully submitted,

CHAS. DUSHKIND,
Counsel for Appellant.

APPENDIX.

Opinion of Mr. Justice Bijur in the Lee case holding the statute involved in the case at bar unconstitutional.

BIJUR, J.—This is an application for an injunction against the officials of the State and city to restrain the enforcement of Laws 1910, chapter 348, being an amendment to the General Business Law in relation to private banking.

This act provides that no person shall engage in the business of "receiving deposits of money for safekeeping or for the purpose of transmission to another, or for any other purpose," without having theretofore procured a license (sec. 25). The transaction of business without such license or in violation of any of the provisions of the act is made a misdemeanor (secs. 27 and 29f). There is a further penalty of $100 per day for failure to make the reports required (sec. 29). Persons subject to its provisions are also required to furnish quarterly statements to the State Comptroller. The license, for which there is a fee of $50, does

not issue automatically, but is granted only in the discretion of the comptroller. As a prerequisite the applicant is required to file a statement of his assets and liabilities, to deposit $10,000 either in cash or securities, and to furnish a bond in an amount of from $10,000 to $50,000, as may be fixed by the comptroller.

Section 29d of the act exempts from its provisions five classes, with the first three of which, however, we are not at the moment concerned. The fourth class exempted comprises private bankers "where the average amount of each sum received on deposit or for transmission in the ordinary course of business during the fiscal year preceding shall not be less than $500."

The fifth class consists of private bankers who file with the comptroller a bond in the sum of $100,000 in cities of the first class or of $50,000 elsewhere.

The injunction is sought on the ground that the act is unconstitutional, eight separate reasons for that claim being put forward. Practically all the serious objections may be summed up in the contention that the act violates section 1 of the Fourteenth Amendment of the Constitution of the United States in that it deprives persons of their property without due process of law and denies them the equal protection of the laws. More specifically it is urged that the act exceeds the police power of the State and that it imposes unequal conditions and creates arbitrary classifications. It is pointed out also that the discretion granted to the State Comptroller to issue or withhold the license is arbitrary and therefore unconstitutional.

At the outset I have been met, on behalf of one of the defendants, by the objection that equity

should not interfere to enjoin the enforcement of the criminal law, but that the plaintiff should be left to his ordinary remedy at law, namely, the setting up of the unconstitutionality of the act in the event that he be prosecuted criminally for its violation. I am inclined to think that this objection is well taken (see Delany v. Flood, 183 N. Y., 323; Eden Musee v. Bingham, 125 App. Div., 780; Davis v. Am. Soc'y for the Prevention of Cruelty to Animals, 75 N. Y., 362).

There were other grounds for the interposition of the Court in the Consolidated Gas Company cases (146 Fed. Rep., 150; 212 U. S., 19), as, for example, actual or threatened action of the gas commission claimed to amount to confiscation of the company's property.

The defendant, however, who makes this objection in the case at bar has been eliminated by discontinuance, and the remaining defendants ask for a determination of the application on its merits.

While I have some doubt whether the Court should proceed in this way, nevertheless in view of the great public interest in the question and following the precedent set by the Supreme Court of the United States in a somewhat similar case and under analogous circumstances (see Pollack v. Farmers Loan & Trust Co., 157 U. S., 429, 554, also 608-612) I have concluded to consider the constitutionality of the act.

It can hardly be doubted at the present time, that the business of banking is of such nature as to warrant its regulation by the State under the general police power (Attorney-General v. Utica Insurance Co., 2 Johnson's Chancery, 375; Same v. Same, 15 Johnson, 358; Curtis v. Leavitt, 15 N.

Y., 925; and a long line of cases in other States ending with the recent decisions of Weed v. Bergh, 124 N. W. Rep., 664; Wis., and McLaren v. State, 124 N. W. Rep., 667, Wis.).

We come, then, to the question of classification. In the first place, it is to be noted that the statute distinguishes between persons of different degrees of wealth in that the conduct of this business is restricted substantially to persons who have a minimum of $20,000 rather than to persons of approved probity or sound judgment, and that a person who can procure a bond of $100,000 may remove himself entirely from the restraints of the act. This is a novel standard in our legislation.

"A classification in order to be relieved from the reach of the equality clause of the Fourteenth Amendment must be upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection (Gulf, Colo. & S. F. RR. v. Ellis, 165 U. S., 150, 165).

This rule is subject to the limitation laid down by Judge Vann in People *ex rel.* Farrington v. Mensching (187 N. Y.) where, at page 16, he says: "By this we do not understand that great court to mean that the relation must necessarily be 'reasonable and proper' according to the judgment of reviewing judges, but that the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In others words, there must be enough reason for it to support an argument, even if the reason is unsound."

I have not been referred to any case in which a classification based solely on degrees of wealth has been held valid; but I can see that, from certain

points of view, in the banking business, as for example in considering ability to issue credits, the possession of wealth may be regarded as some guarantee of responsibility and stability. Still in the last analysis, it is the integrity and sound business judgment of the banker which affords to a mere *depositor* the assurance of the safety of his funds.

My doubts as to the validity of this provision have been somewhat weakened, though not entirely removed, by an expression of opinion (mere *obiter*, though it be), of the Court of Appeals in Musco v. United Surety Co. (196 N. Y., 459, 466). The Court there says: "It is quite probable that *if necessary* we could find sufficient reason to justify the Legislature in distinguishing between transatlantic steamship companies *almost necessarily possessing large capital and credit* and individuals of the class to which appellant belongs which frequently may be expected to be without either." This was said with reference to the "Wells Law" (L. 1907, ch. 185), which required a bond to be given by any person engaged in the business of selling transportation tickets in conjunction with receiving deposits of money for the purpose of transmission to foreign countries, and to the exemption from the provisions of that act, of "drafts, money orders and travelers' checks issued by transatlantic steamship companies or their authorized agents." While this case was apparently decided primarily on the ground that the defendant, having voluntarily given the bond, thereby waived any objections to the constitutionality of the requirement, I attach due weight to the opinion of this high tribunal in commenting upon the propriety of a classification based on relative amounts of capital.

But I find far greater difficulty in reconciling with the test established by the Federal Supreme Court that provision of the present statute which limits its application to those bankers whose clients' deposits are of an annual average of less than $500. There is nothing to which my attention has been called in the report of the immigration commission (which inspired this legislation) which directly warrants this distinction. It is sought to be justified by the learned counsel for the defendants on the theory that the persons found to have been subject to the abuse aimed at by the statute are largely recently arrived immigrants, persons of modest means, *i. e.*, with general deposits averaging less than $500 annually, who are less likely to be able adequately to protect their own interests than would be persons who make or have larger deposits. This argument, however, strikes me as one not based in any substantial distinction, sound or unsound. Merely because the commission has found that a number of small bankers have absconded with the funds intrusted to them by modest depositors it does not follow that bankers may be lawfully classified under a State statute according to the annual average of individual deposits, and those enjoying large deposits be relieved from making public the details of their business and from the other presumably wisely imposed burdens of the act. Moreover, though this may be of minor importance, it is quite evident that a person may have a small deposit with a number of bankers. Finally, I neither find in the report of the commission nor in my own experience evidence that depositors of small sums are less intelligent, able or zealous in protecting their interests than are the other de-

positors. My impressions are rather to the contrary.

I have the highest appreciation for the good intentions and beneficent motivees of the promoters and framers of this legislation, but in respect of the particular provision now under discussion I believe that the reasoning advanced for the classification is too speculative and the classification itself too adventitious to meet the test of constitutionality hereinabove set forth.

Moreover, relief is here sought by a plaintiff who is a "curb broker." It is true that defendants do not concede in so many words that the statute covers his case; but the plaintiff so alleges and it is not denied, and the argument has proceeded before me on the theory that the provisions of the act do indeed cover his business. None of the facts adduced by the commission of immigration in its report, none of the considerations relating to inexperienced foreigners recently arrived, and none of the many other distinctions which correctly or incorrectly are attributed to immigrant depositors with private bankers have any relation to customers of brokers. Confining myself, therefore, strictly to the merits of the application now before me, I am compelled to hold that there is no reason, sound or unsound, for imposing upon brokers a requirement of wealth or a classification based upon the amount of the average annual deposits of their customers.

I believe, too, that plaintiff's objection that the act invests the comptroller with a purely arbitrary discretion is good. The language of the act (sec. 25) is: "After notice of the application shall have been so posted for a period of two weeks, he (the comptroller) may, in his discretion, approve or disapprove the application."

It must be conceded, of course, as was done in Lieberman v. Van de Carr by the Appellate Division of this Court (81 App. Div., 128), by the Court of Appeals (175 N. Y., 440), and by the Supreme Court of the United States (199 U. S., 552, 560) that the Legislature may properly give "administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations or perform acts which are properly the subject of regulation in the exercise of the reserved power of the State to protect the health and safety of its people;" and "that it is presumed that public officials will discharge their duties honestly and in accordance with the rules of law;" and that the delegation of such power to an individual has been sustained in Wilson v. Eureka City (173 U. S., 32) and Gundling v. Chicago (177 U. S., 183). But if I understand the principle and interpret correctly the views of the Supreme Court expressed in Yick Wo v. Hopkins (118 U. S., 356) there must be in the act which confers the discretion or in the general character of the legislation, or at least in its history, some indication of the test or standard by which the discretion of the officer is to be exercised or controlled. It is true that in the case of Yick Wo the Court was evidently somewhat influenced by the fact that the administration of the ordinance in respect of Chinese laundries was arbitrarily and clearly designed to discriminate against the Chinese; but the Court did not fail to condemn the character of the ordinance itself in that it failed to point out any test as to the competency of the persons applying for a license or the propriety of the place selected for carrying on the business. It cites with approval City of Baltimore v. Radecke (49

Maryland, 217), where the Court of Appeals of Maryland said: "It (the ordinance) lays down no *rules* by which its *impartial execution* can be secured or partiality or oppression prevented."

All these considerations, I think, are again emphasized by the fact that the act now under discussion covers the case of the plaintiff, a broker; and the emphasis is increased, or, to say the least, no aid is lent toward finding a standard by section 29e of the act, which reads:

"Nothing in this article contained shall be construed to require the comptroller to make any inquiry or examination as to the responsibility or solvency of any applicant for a license or of any licensee hereunder."

It has occurred to me that it might be urged that the infirmity of the act, in so far as its terms cover the business of brokerage and like occupations, might be removed by the elimination of the words, "or for any other purpose" after the phrase "receiving deposits of money for safekeeping or for the purpose of transmission to another." But on the one hand, the courts cannot amend legislation by limiting its scope through the elimination of one or more classes which it plainly described; nor, even if we could hold the act constitutional as to bankers and treat its provisions as to other occupations as separable, is there anything in the record before me to warrant the conclusion that the phrase without its obnoxious extension would be sufficiently descriptive of any one class which the Legislature may have had in mind.

Motion granted. Settle order on notice.

FILED
DEC 8 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 703.

MORRIS ENGEL, APPELLANT,

against

EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS AND WILLIAM F. BAKER, APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEE, WILLIAM F. BAKER.

THEODORE CONNOLY,
Acting Corporation Counsel,
Counsel for Appellee, WILLIAM F. BAKER,
Hall of Records,
New York City.

Supreme Court of the United States.

MORRIS ENGEL, Appellant, *against* EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER, Appellees.	October Term, 1910. No. 703.

Brief and Argument for Appellee, William F. Baker.

Statement of the Case.

This is an appeal from the final decree in the United States Circuit Court for the Southern District of New York. The suit was instituted to have declared and adjudged unconstitutional chapter 348 of the Laws of 1910, of the Laws of the State of New York entitled, "An Act to amend the general business law in relation to private banking and to repeal article ten thereof relating to ticket agents."

The amendment of the General Business Law, which latter was passed as a part of the new statutory revision of New York known as the Consolidated Laws (Laws of 1909, chapter 45, of the Laws of the State of New York) and which was entitled "An Act relating to general business constituting chapter 20 of the consolidated laws," was made

by inserting a new article into the Business Law, which article was entitled "Article 3-a," and appears on page 614 of volume 1 of the Laws of the State of New York for 1910.

Three separate demurrers were interposed to the bill of complaint, one of which was on behalf of the defendant Baker, appellee, and the grounds of demurrer therein set forth were the same as alleged in the other two demurrers interposed on behalf of the other appellees. These grounds were:

First—That the complainant has not made such a cause as entitled him to any relief (Record, pp. 14 to 17).

Second—That the bill does not contain any matter of equity whereon the Court can grant any decree or give the complainant any relief or assistance.

Third—That the complainant has not stated facts sufficient to constitute a cause of action.

Fourth—That it appears on the face of the said bill that chapter 348 of the Laws of 1910 of the State of New York, is in all respects valid and in conformity with the Constitution of the United States and with the several amendments thereof.

The statute in question is printed in full on pages 9-14 of the Record.

The relief asked for in the bill of complaint is that the statute be declared unconstitutional and that defendants be restrained, etc., from enforcing the same against the complainant (Record, pp. 2-8).

POINT I.

The decree of the United States Circuit Court should be affirmed.

The only interest of the present appellee, William F. Baker, is that he was, at the time this suit was brought, Police Commissioner of The City of New York, and as such was under the duty of enforcing the laws of the State of New York, so far as his jurisdiction extended.

Being only a formal party and having no interest in the controversy, except as may have arisen by reason of his official duties, this appellee thinks it proper, instead of burdening this Court with a duplication of the arguments made by the other appellees herein and instead of filing a brief on the merits of this appeal, that he should submit the controversy to this Honorable Court upon the grounds suggested in the argument of his co-appellees.

This appellee asks that the decree below be affirmed.

Dated New York December 1, 1910.

All of which is respectfully submitted.

THEODORE CONNOLY,
Acting Corporation Counsel,
Counsel for Appellee, William F. Baker.

(13498)

M. B. BROWN PRINTING & BINDING CO., 49-57 Park Place, N. Y.

Supreme Court, U. S.
FILED
DEC 5 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 703.

MORRIS ENGEL, APPELLANT,

vs.

EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS, AND WILLIAM F. BAKER, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEES' POINTS.

LOUIS MARSHALL,
E. N. LETCHWORTH,
of Counsel.

Supreme Court of the United States.

MORRIS ENGEL, Appellant, *against* EDWARD R. O'MALLEY, FRANK MOSS, CLARK WILLIAMS and WILLIAM F. BAKER, Appellees.	October Term, 1910, No. 703.

Appeal from the Circuit Court of the United States from the Southern District of New York.

Appellees' Points.

This is an appeal from a decree rendered by Judge Lacombe, on September 10, 1910, which sustained the demurrers interposed to the bill of complaint, by the several defendants, and dismissed the bill with costs (Rec., pp. 29-30).

The action was brought for the avowed purpose of enjoining the enforcement of chapter 348 of the Laws of 1910, enacted by the Legislature of the State of New York, on the ground of its alleged unconstitutionality, and particularly to enjoin the defendants from enforcing its provisions, the defendant O'Malley being the Attorney General of the State of New York, the defendant Williams the Comptroller of

the State of New York, the defendant Moss the Acting District Attorney of New York County and the defendant Baker the Police Commissioner of New York City (fols. 31-45).

The act which is thus sought to be nullified is entitled "An act to amend the general business law, in relation to private banking, and to repeal article ten thereof relating to ticket agents." It is made a part of the bill of complaint and is to be found at pages 8 to 14 of the Record. It seeks to regulate the conduct of individuals or partnerships engaged directly or indirectly "in the business of receiving deposits of money for safe keeping or for the purpose of transmission to another, or for any other purpose, in cities of the first class, without first having obtained from the Comptroller a license to engage in such business."

The bill alleges "that during the time therein mentioned the complainant has been and is now engaged in the business of receiving deposits of money from various persons for the purpose of transmission of same to other persons in various cities, States and countries and also of receiving deposits of money from various people for safe-keeping and various other purposes; that the complainant has in fact been engaged in said line of business for over twenty years; and during all these years the complainant has succeeded in building up and establishing for himself an excellent reputation as a result of which (his) business has become very profitable and the god will thereof has become and is very valuable" * * * "that by reason of (his) long experience and good reputation in said business (he) * * * has succeeded in building up a good business of receiving deposits from various persons for the purpose of transmission to others in various cities and States, other than the State of New York, and for-

eign countries, for which they received certain commissions, percentages or profits yielding them considerable incomes" (Rec., pp. 2 and 3).

The bill further alleges that the complainant "has also been receiving deposits of money from such parties for safe keeping, it being customary for such depositors to make deposits in exceedingly small sums from time to time until their deposits aggregated a certain amount sufficient to be transmitted to their friends, relatives or other parties to places other than the State of New York, and mainly to foreign countries" (fol. 6).

The bill further alleges that the complainant is a citizen of the United States (Rec., p. 3), and has been and is engaged in this business in The City of New York, which is a city of the first class within the meaning of chapter 348 of the Laws of 1910, and that his "main business" consists of receiving and obtaining deposits of money for the purpose of transmission of the same to parties in States other than the State of New York, and in foreign countries (fol. 16); that it is intended to enforce this statute against the complainant if he should continue to carry on his business after September 1 without a license from the State Comptroller; that he is unable to obtain such license because of his inability to comply with the terms and conditions imposed by the statute; that he is not exempt from the operation of the act, and that he has neither the means nor capital which would enable him to make the deposit and to give the bond required by the statute, and that if the law should be enforced against him he will be compelled to abandon his business and lose his profits and income therefrom, as well as the good-will appurtenant thereto.

There are other allegations of the bill, which are merely conclusions of law, and are therefore to be ignored under the authorities.

Southern Pacific Ry. Co. vs. *King*, 217 U. S., 524.
1 *Street Federal Eq. Pr.*, sec. 927.
1 *Foster's Fed. Pr.*, 4th ed., sec. 106.
Greef vs. *Equitable Life Assurance Soc.*, 160 N. Y., 19.
Park & Sons Co. vs. *National Druggists' Assn.*, 175 N. Y., 1.

The appellees demurred to the bill on the grounds

1. The complainant has not made by his bill such a cause as entitles him to any relief in a court of equity.

2. The bill does not contain any matter of equity wherein the Court can give the complainant any relief.

3. The complainant has not stated facts sufficient to constitute a cause of action against the defendants.

4. It appears on the face of the bill that chapter 348 of the Laws is valid, and not violative of the Constitution.

On final hearing the demurrers to the bill were sustained and a decree was entered dismissing the bill of complaint with costs.

The assignments of error raise three questions:

(1) That the act violates the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff of property without due process of law.

(2) That it denies to him the equal protection of the laws.

(3) That it regulates commerce among the several States and with foreign nations, and imposes a tax upon such commerce.

The legislation which has been thus attacked was the outcome of an investigation instituted pursuant to the provisions of chapter 210 of the Laws of 1908 of the State of New York, providing for the appointment of a Commission "to make full inquiry, examination and investigation into the condition, welfare and industrial opportunity of aliens in the State of New York." The Commission so appointed rendered a report to the Governor on March 30, 1909, which was transmitted by him to the Legislature on April 5, 1909. So much of the report as relates to the subject of Private Banking is reprinted in full in Appendices I, II and III.

POINTS.

I.

The act does not deprive the complainant of his liberty or property without due process of law, but seeks merely to regulate the business in which he is engaged, which affects the public welfare to an important extent, by imposing reasonable safeguards, dictated by experience and found necessary for the protection of those dealing with private bankers of a class to which the complainant belongs.

The act does not prohibit private banking. It does not affect the right or liberty of any citizen

to engage in the business. On the contrary, one complying with the conditions of the act is entitled to a license under which he can conduct the business of a private banker and its several branches. He is required to keep books and records, to make sworn reports to the Comptroller four times a year, showing the amount of his assets and liabilities, and is subject to the penalties of the act for failing to make reports, or for the commission of perjury. In other words, the act regulates the business so that it is not to be conducted as heretofore, without supervision of any substantial character, and without affording reasonable protection to those reposing trust and confidence in the private individuals assuming to exercise the important function of banking.

It would be most extraordinary, if men engaged in this business, who invite the ignorant and helpless to entrust to them their savings, were so far above the law that it could not keep their business under surveillance and require them to afford reasonable security to those dealing with them, that, when called upon to do so, they will account for moneys received.

In thus regulating the business of these private bankers, the Legislature has but exercised the police power in one of its most familiar forms.

Professor Freund, in his excellent work on the police power, defines his subject as being "the power of promoting the public welfare by restraining and regulating the use of liberty and property."

Hence the mere fact that this act to some extent curtails the unrestricted liberty heretofore existing of carrying on the business of a private bank, including, as it does, the receipt of money on deposit for safe-keeping, for transmission and for other kindred purposes, and of regulating the property employed in such busi-

ness, does not constitute a deprivation of liberty and property without due process of law, unless there is something in the essential nature of private banking which differentiates that business from the hundreds of other occupations which the Legislature has from time to time sought to regulate by methods similar to those which have been adopted in the act now under consideration.

In essential provisions, this act is modeled upon chapter 342 of the Laws of 1904 of the State of New York, which regulates the keeping of employment agencies in cities of the first and second classes, where it was provided that no person should conduct such an agency without first procuring a license, and which subjected the licensee to various penalties for a violation of a large number of regulative clauses, all of which were new.

In sustaining the validity of the act in *People* ex rel. *Armstrong* vs. *Warden of the City Prison*, 183 *N. Y.*, 223, 226, Judge O'Brien said:

> "The other objection made by the relator to the validity of the statute presents a question which has been very much discussed in this court as well as in other courts, and that is that the statute interferes with the relator's right to carry on a lawful business without being hampered by statutory regulations. The cases are abundant which hold that the individual has the right to carry on any lawful business, or earn his living in any lawful way, and that the legislature has no right to interfere with his freedom of action in that respect, or otherwise, to place restraints upon his movements. But, of course, these cases must all be understood as applying to laws that are not within the police power. If the statute comes fairly within the scope of the police power it is a valid law, although it may interfere, in some respects, with

the liberty of the citizen, which of course includes his right to follow any lawful employment. A statute to promote the public health, the public safety or to secure public order or for the prevention or suppression of fraud is a valid law, although it may, in some respects, interfere with individual freedom. All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience and general welfare or the prevention of fraud or immorality.

"We think that such is the character of the statute in question. It is intended to regulate employment agencies in cities. The Legislature had the right to take notice of the fact that such agencies are places where immigrants and ignorant people frequently resort to obtain employment and to procure information. The relation of a person consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality."

In *Musco* vs. *United Surety Co.*, 132 App. Div., 300, which involved the constitutionality of chapter 185 of the Laws of 1907 (the so-called Wells Law considered in the report of the Immigration Commission to which reference has been made) the Appellate Division, through Mr. Justice Houghton, said:

"It will be observed that the law does not prohibit any person from engaging in the busi-

ness of selling steamship or railroad tickets to or from foreign countries, and that no bond is required of one who is engaged in that business alone. When however, a person desires to add to such business that of receiving money for transmission to foreign countries, or a virtual banking business, the law requires that he shall give a bond for the faithful discharge of his obligations in connection therewith. The law does not operate as a prohibition against any person engaging in the business of transmitting money to foreign countries. It merely regulates the carrying on of that business by guarding, in the form of a bond, against imposition, fraud and embezzlement. Such a regulation seems to us a very wholesome one and one already within the power of the Legislature to establish. As a general proposition, of course, a citizen has the right to carry on any lawful business in any lawful way, without legislative interference; but under the police power, the Legislature has the right to enact laws tending toward the public welfare or toward the prevention or suppression of fraud. The Legislature could well take notice of the frequent embezzlements and misappropriations by transatlantic ticket agents of funds entrusted to them for transmission by their fellow-countrymen, and that ignorant emigrants were more likely to entrust money for transmission to their home countries to the men who had charge of the transporting of themselves or their friends than through regular banking institutions. For the purpose of preventing imposition and fraud and crime, and promotion of the public welfare, the Legislature had the right to enact a law regulating the carrying on of such business and imposing as a condition the giving of a bond in any reason-

able amount. In principle we see no difference between the present case and that of *People ex rel. Armstrong* vs. *Warden, etc.*, 183 N. Y., 223. * * *"

This decision was affirmed by the Court of Appeals in 196 N. Y., 459, where Judge Hiscock, speaking for that court, said:

"The regulation of the business of receiving deposits is plainly within the power possessed by the State to regulate the conduct of various pursuits when necessary for the protection of the public. We have no difficulty in approving as constitutional the action of the Legislature in subjecting to regulation the particular class of people designated by the statute. We doubtless may take judicial notice of the public report made by the Commission of Immigration recently appointed by the Governor to inquire into the condition and welfare of aliens in this State, and by which report it appears that there has been a special disposition on the part of ignorant aliens to deposit for transmission abroad moneys with irresponsible persons who carried on the business of selling steamship tickets; that the latter class of business naturally attracted the former branch, which resulted in widespread frauds upon and losses by the ignorant depositors. Even if we should ignore this report we might readily assume that the Legislature had knowledge of the very conditions presented by it, and, therefore, were justified in selecting for regulation the class of persons whom it did select.

"This statute in question is so entirely different in the nature of its provisions from the one absolutely prohibiting the sale of railroad

tickets, except by a limited class of persons, which was under consideration in the case of People *ex rel.* Tyroler *vs.* Warden of City Prison, 157 N. Y., 116, and which is especially relied upon by appellant, that we do not deem it necessary to occupy space in pointing out the differences."

Other recent illustrations of legislation regulating various occupations by requiring them to be licensed, or by imposing special taxation upon them, or subjecting them to inspection, or by imposing other conditions to some extent hampering those engaged in the occupation, or affecting the profitableness of the property invested in the business, which has been declared constitutional, are afforded by the following cases:

Powell vs. *Pennsylvania*, 127 U. S., 678.
Plumley vs. *Massachusetts*, 155 U. S., 461;

acts relating to the business of manufacturing oleomargarine;

Giozza vs. *Tiernan*, 148 U. S., 657.
Gray vs. *Connecticut*, 159 U. S., 74;

acts relating to the business of dealing in spirituous liquors;

Holden vs. *Hardy*, 169 U. S., 366;
an act relating to mine inspection;

American Sugar Refining Co. vs. *Louisiana*, 179 U. S., 89;

the licensing of the business of refining sugar and molasses;

Williams vs. *Fears*, 179 U. S., 270;

an act imposing a tax on the business of emigrant agent;

Clark vs. *Titusville*, 184 U. S., 329;

an act imposing a license tax upon various persons carrying on certain occupations within a municipality, based on the amount of sales;

St. Louis Consolidated Coal Co. vs. *Illinois*, 185 U. S. 203;

an act providing for the inspection of coal mines, the cost to be paid by the mine owners;

People ex rel. *Lieberman vs. Van de Carr*, 199 U. S. 552;

a section in the Sanitary Code of New York City conferring discretionary power on the Board of Health to grant or withhold permission to carry on the business of selling milk;

Reduction Co. vs. *Sanitary Reduction Works*, 199, U. S. 306;
Gardner vs. *Michigan*, 199 U. S. 325;

acts regulating the disposition of garbage;

Wilmington Mining Co. vs. *Fulton*, 205 U. S. 60;

an act regulating the liability of mine owners to employees;

Cox vs. *Texas*, 202 U. S. 446;

an act in regard to the sale of liquor to minors;

Gundling vs. *Chicago*, 177 U. S. 183;
Austin vs. *Tennessee*, 179 U. S. 343;

acts relating to the sale of cigarettes;

Booth vs. *Illinois*, 184 U. S. 425;

an act relating to options to sell or buy grain;

Dent vs. *West Virginia*, 129 U. S. 114;
Hawker vs. *New York*, 170 U. S. 194;
Watson vs. *Maryland*, 218 U. S. 173;

acts to regulate the practice of medicine;

Smith vs. *Alabama*, 124 U. S. 465;

an act requiring locomotive engineers to be examined and lincensed;

W. W. *Cargill Co.* vs. *Minnesota*, 180 U. S. 452;

an act to regulate grain elevators and subjecting them to supervision and inspection.

In the case last cited Mr. Justice Harlan said (p. 467):

"Thus considering the statute, we are of opinion that the mere requirement of a license from a person, firm or corporation engaged in such business as that conducted by the defendant is not forbidden by the Fourteenth Amendment of the Constitution of the United States. 'The liberty mentioned in that Amendment,' we have said, 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary

and essential to his carrying out to a successful conclusion the purposes above mentioned.' Allgeyer *vs.* Louisiana, 165 U. S., 578, 589. But to require the defendant company to obtain a license is not forbidden by the amendment. The authority to make such a requirement is to be referred to the general power of the State to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition. Dent *vs.* West Virginia, 129 U. S., 114, 122; Plumley *vs.* Massachusetts, 155 U. S., 461. The State court well said that the defendant's warehouse could be fairly regarded 'as a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as market-master, weighmaster, inspector and grader of the grain.' We cannot question the power of the State, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation."

Without referring to a multitude of decisions in various State courts, of like import, it suffices to call attention to *Nechumcus* vs. *Warden of City Prison*, 144 N. Y., 529, which sustained an act providing for the examination and registration of master plumbers; *Tenement House Department* vs. *Moeschen*, 179 N. Y., 325, which required all school sinks in existing tenement houses in cities of the first class to be removed and to be replaced by individual water-closets, although the expense involved was so large as to destroy the defendant's

equity in the property affected; and *Health Department* vs. *Rector*, 145 N. Y., 32, which sustained an act requiring the owner of a tenement house to supply water on every floor, although compliance involved the expenditure of a large sum for the proper equipment of the buildings theretofore constructed.

In the opinion rendered by Judge Peckham in the case last cited, numerous illustrations were instanced of legitimate legislation regulative of the use of property, which was considered as constituting a proper exercise of the police power, although applicable to existing property rights.

See also—

Grand Rapids vs. *Braudy*, 105 *Mich.*, 670; *S. C.*, 32 L. R. A., 116.

which sustained the validity of an ordinance requiring junk dealers and second-hand dealers to pay an annual license fee of $25 and to give a bond of $2,000, and pawnbrokers $50 and a bond of $5,000, as well as an endorsement by twelve freeholders favoring the application for a license by a pawnbroker or a junk dealer.

Coming now to legislation directly relating to the subject of private banking, we find that as early as in 1817, in *Attorney General* vs. *Utica Insurance Co.*, 2 Johns, Ch. 375, Chancellor Kent said:

> "The right of banking was, formerly, a common law right, belonging to individuals, and to be exercised at their pleasure. But the Legislature thought proper, by the restraining act of 1804, and which has been since re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the Legislature, and subsisting only in those who can produce the grant; if exercised by other persons, it is the usurpation of a privilege, for

which a competent remedy can be had by the public prosecutor in the Supreme Court."

In *People* ex rel. *Attorney General* vs. *Utica Insurance Co.*, 15 Johns., 358, it was declared that, while formerly the right to engage in the banking business was a common law right belonging to individuals and to be exercised at their pleasure, it could not admit of doubt that the Legislature had authority to regulate, modify or restrain this right.

In *Curtis* vs. *Leavitt*, 15 N. Y., 952, the Court stated that banking is not in its nature a corporate franchise, but "in the absence of 'legislative restraint,' may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving, depositing, discounting, dealing in exchange, bullion, etc."; thus implying that such right may, by legislative action, be denied to individuals.

Perkins vs. *Smith*, 116 N .Y., 444, expressly recognizes this right to prohibit private banking. Ch. J. Follett saying: "The right to engage in banking is a common law right, *and in the absence of statutory restraint*, persons may issue circulating notes and carry on the business of banking in all its branches." He then shows that by Laws of 1818, chapter 236, private banking was prohibited, and that such prohibition continued in force until 1837.

In the same sense this Court declared in *Bank of Augusta* vs. *Earle*, 13 Pet., 519, 596: "At common law the right of banking in all of its ramifications belonged to individual citizens and might be exercised by them at pleasure * * * *Undoubtedly the sovereign authority may regulate and restrain this right.*"

In *Blaker* vs. *Hood*, 53 Kan., 499, 24 L. R. A., 854, the Court, while disclaiming any intention to pass upon the right of a State to absolutely prohibit private banking, upheld, as a legitimate exercise of

the police power, an act providing for the organization of corporate banks, and for the regulation of all banking business, except that done by national banks, whether conducted by corporations, partnerships or individuals; creating the office of bank commissioner; requiring that all engaged in the banking business make reports to him of their resources and liabilities and submit to inspection and investigation in order to disclose their financial condition; and prescribing methods of business intended to protect depositors and patrons.

In *Youngblood* vs. *Birmingham Trust & Savings Co.*, 95 Ala., 521, 20 L. R. A., 58, a statute making it a misdemeanor for any banker to discount commercial paper at more than a certain rate per cent. was upheld as against an objection that it was unconstitutional as class legislation because it applied to bankers only.

In *State of Indiana* vs. *Richcreek*, 77 N. E. Rep., 1085, s. c. 5, L. R. A., N. S., 874, an act requiring that the real estate, furniture and fixtures of a private banker should constitute no more than one-third of the entire capital of the bank, was held not to violate the constitutional provisions against taking property without compensation or due process of law. It was likewise held that the provisions requiring the responsibility and net worth of the individual members of a private banking concern to be equal to an amount at least double the amount of capital paid into the bank, did not violate any constitutional provision; nor did the requirement that at least one member of a private banking firm should be a resident of the State where the business was conducted.

Mr. Justice Montgomery said:

> "The right of banking, in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded

by counsel, and it is unquestionably settled, that the sovereign authority of the State may regulate and restrain the exercise of such right. (Citing many cases.)

"The quasi public nature of the banking business, and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the State, clearly bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit, and usually obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion, and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency, and of protecting their interest in cases of insolvency, justify inspection and control by the State. When the sovereign people of a State, acting through the legislature, find such police regulation necessary to protect public health, safety or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental law. The question as to what regulations are proper and needful is primarily for legislative decision; yet, when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. * * *

"The circumstances that for a time it (the act) may inflict hardship, inconvenience, and possibly loss to certain individuals does not amount to a constitutional objection so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly designed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business, admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be seriously abridged or wholly destroyed. * * *

"The charters of the national banks, State banks, or discount and deposit, savings banks, and loan and deposit companies, authorize them to hold permanently only such real estate as may be necessary for the immediate and convenient accommodation of their business. It is not required that this limitation be altogether wise and just to warrant a holding that it is valid, but it is sufficient if it appears that it was designed and is reasonably calculated to subserve some public purpose."

In *State* ex rel. *Goodsill* vs. *Woodmansee*, 1, N. D., 246, S. C., 11, L. R. A., 420, an act was held to be constitutional which prohibited private banking within the State, and restricted the right to carry on banking to corporations, Mr Justice Wallin saying, after considering the authorities:

"It is true that it has been held that the provision relative to personal liberty found in our Constitution might be violated by the enactment of a statute which operated to deprive a citizen of the right to pursue a lawful trade or avocation. But, on the other hand, it is conceded that

the business of banking, by reason of its very intimate relations to the fiscal affairs of the people, and the revenues of the State, is and has ever been considered a proper subject of legislative control, and strictly within the domain of the internal police power of every State. As a matter of fact, we have been unable to find an authority, and we have searched diligently, which has ever questioned the right of the Legislature in the exercise of police power to regulate, restrain and govern the business of banking. * * * It would avail little, in our view of the matter, to provide salutary rules and wholesome safeguards for the business of banking when carried on by a corporation, if at the same time private persons, firms and corporations are permitted to carry on the business unhampered by such restrictions and safeguards. But, as a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other States have frequently exercised the right of supreme control over the business."

It is true that in *State of South Dakota* vs. *Scougal*, 3 S. D., 55 S. C., 15 L. R. A., 477, it was held that it was not within the power of the Legislature to prohibit private banking altogether; but the right to regulate it was expressly conceded, Mr. Justice Corson saying:

"The business may be regulated, but not prohibited. Mr. Tiedeman, in his excellent work on the Limitations of Police Powers, says: 'In order to prohibit the prosecution of the trade alto-

gether, the injury to the public which furnishes the justification for such a law must proceed from the inherent character of the business. Where it is possible to conduct the business without harm to the public, all sorts of police regulations may be instituted which may tend to suppress the evil. License may be required, the most rigid system of police regulations may be established, and heavy penalties may be imposed for the infraction of the law, but if the business is not harmful, the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner.' *Tiedeman, Pol. Pow., p.* 290."

The decisions in *Weed* vs. *Bergh*, 124 N. W. Rep., 664 and *Maclaren* vs. *State*, 124 N. W. Rep., 667, afford recent examples of legislation of the same character as that now under discussion.

In the first of these cases a statute of Wisconsin, forbidding any person to carry on the banking business except under the terms of an act regulating the subject, was held to be constitutional, and in the second it was held that a department store which received deposits up to a certain amount, issued passbooks, paid interest on the amount deposited, and paid the principal with interest thereon on demand in money or goods at the election of the depositor, was engaged in the banking business, and that any person engaged in the business carried on by banks of deposit, or of discount, or of circulation, was engaged in doing a banking business, although but one of these functions was exercised.

Mr. Justice Barnes said:

"Banking, in its most enlarged sense, includes the business of receiving deposits, paying checks, loaning money, dealing in bills of exchange, etc., besides that of issuing paper money. Boone on Banking, section 3, and cases cited. If a bank

must transact the various kinds of business enumerated in the above definition in order to be a bank at all, it is apparent that we have no such institutions as State banks in Wisconsin, because such banks are not permitted to issue paper money. But the word is popularly and correctly used in a much more restricted sense. In modern times we have a variety of institutions that do a banking business in the popular sense, although the functions performed by them may be widely variant, and none of them may be doing all of the kinds of business included in the above definition. The business conducted by national banks differs from that done by State banks, in that the latter are not banks of issue, while the savings banks do not usually perform all of the kinds of business transacted by other banks. Trust companies that receive deposits and make loans perform two of the most important functions that are performed by banks generally, and for obvious reasons they are subject to regulation to the same extent that banks are. Morse in his work on banking (Vol. 1, section 2), says that, in order to have a bank, 'it is essential that there should be a place where as a regular business the money of others is received on general deposit. There must be a combination of moneys, a joint fund, as a primary condition of the existence, of a bank or banker, or the transaction of banking business.' A bank is defined by Webster as 'an establishment for the custody, loan, exchange, or issue of money, and for facilitating the transmission of funds by drafts, or bills of exchange; an institution incorporated for performing one or more of such functions.' The same authority defines a bank of deposit as one 'which receives money for safekeeping.' In Oulton *vs.* Savings Institution, 17 Wall. 109, 118, the Court said: 'Banks in

the commercial sense are of three kinds, to wit (1) of deposit; (2) of discount; (3) of circulation. Strictly speaking, the term "bank" implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business in the progress of events was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of these functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense.' * * * The following additional authorities hold, correctly, we think, that any person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of those functions may be exercised. Curtis *vs.* Leavitt 15, N. Y., 9, 56; Reed *vs.* People, 125 Ill., 592, 596; People *vs.* Bartow,, 6 Cowen, 290; Hamilton National Bank *vs.* American L. & T. Co., 66 Neb., 67.

"The term 'banking' is generally used in its enlarged sense, but it may also be used in a more narrow and restricted sense. There is no doubt as to the sense in which the Legislature intended to use the term here, because it says that the receiving of deposits as a regular business shall constitute banking."

It has long since been the policy of the State of New York, to restrict the right of banking, so far as pos-

sible, to corporations organized under the banking laws, and to subject those carrying on such business, for the protection of the public, to careful inspection, requiring them to possess adequate capital and to deposit with the Banking Department securities constituting a fund for the protection of depositors. Such is also the policy of our Insurance Law, and of the National Banking Act. The public nature of the business is recognized; and the existence of a duty on the part of the State, to protect those dealing with such corporations, is equally recognized.

New York Banking Law, sections 14, 76.

People vs. *Granite State Provident Assn.*, 161 N. Y., 492.

New York Insurance Law, sections 13-17.

New York Liquor Tax Law, section 16.

Section 22 of the New York General Corporation Law provides:

> "No corporation except a corporation formed under or subject to the banking laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, or buying and selling bills of exchange, or shall issue bills, notes, or other evidences of debt for circulation as money."

The fact that, until now, there has been no serious attempt to regulate the business of any class of private bankers, affords no reason for the contention that such power of regulation does not exist. The fact is, that until the recent investigation, it was not generally understood to what extent it was essential to regulate certain classes of bankers, especially those dealing with immigrants and others making

small deposits, who were enabled to make away with the hard-earned money of thousands of helpless individuals, either through dishonesty or incompetency, or reckless speculation.

Now that the State has recognized the existence of a serious evil, and has sought to find an adequate remedy, the courts will not hesitate, it is believed, to give effect to such legislation, unless its invalidity is apparent beyond a reasonable doubt.

The present case well illustrates the necessity for a protective measure such as that which has now been provided. The complainant, who claims that he has a very profitable business, in which he has been engaged for upwards of twenty years in which he receives deposits without restriction as to amount, finds it "physically" impossible to give the security required by the act, $10,000 of which is to be deposited with the State Comptroller, but under conditions enabling the complainant to treat the amount so deposited as an asset of his business; the remaining security to be in the form of a bond conditioned for the protection of the complainant's depositors, as provided in the act.

It may well be asked, whether one thus destitute of means, according to his own confession, should be permitted to engage in any branch of the business of banking, without restraint, without regulation, according to his own sweet will, and to receive from those ignorant of his financial ability, such sums as they may entrust to him, in the belief that their deposits will be absolutely secured, and that they are incurring no risk or jeopardy. The higher the complainant's reputation, the greater the danger which will confront his depositors, so long as he can gather unlimited deposits without supervision of any kind and without control or regulation of any sort.

If private employment agencies, if plumbers, or if those engaged in any other private business or occupation, can be subjected to control and regulation, as is indicated by the numerous precedents to which attention has been called, then it must be *a fortiori* true, that private banking not only can, but should be similarly regulated. That it has not been prohibited, as it is believed it might have been, is due entirely to the grace of the sovereign power.

In view of the decision in *Mugler* vs. *Kansas*, 123 U. S., 623, it is unnecessary to indulge in protracted argument with respect to the contention of the complainant that his alleged inability to comply with the conditions of the act may result in the destruction of his business and of its goodwill.

II.

There is no merit in the attack on this legislation based on the claims that the right to a license depends on five years' residence in the United States and that the Comptroller is vested with discretionary power with respect to the granting of licenses.

(*a*) *It being conceded that the complainant is a citizen and has carried on business in the State of New York for upwards of twenty years, and there being nothing to indicate that he has applied for or has been refused a license, by the Comptroller on any grounds, whatsoever, he is not in a position to attack the constitutionality of this law, even assuming, but by no means conceding, that in a proper case the provisions relating to five years' residence, and to the discretionary power of the Comptroller with*

respect to the granting or refusing of a license, might be successfully attacked.

As said by Mr. Justice Day in *Southern Pacific Ry. Co.* vs. *King*, 217 *U. S.*, 534:

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

To the same effect are many other cases, among which are:

Williams vs. *Eggleston*, 170 U. S., 304.
Tyler vs. *Judges of Registration*, 179 U. S., 405.
Turpin vs. *Lemon*, 187 U. S., 51, 60.
Hooker vs. *Burr*, 194 U. S., 415.
Worcester vs. *Worcester Con. St. Ry. Co.*, 196 U. S., 538.
Hatch vs. *Reardon*, 204 U. S., 152, 160.

One whose rights or liabilities are not affected by a statute cannot question its constitutionality.

Albany County vs. *Stanley*, 105 U. S., 305.

One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity.

Red River Valley National Bank vs. *Craig*, 181 U. S., 548.

In *Southwestern Oil Co.* vs. *Texas*, 217 U. S., 114 it was held:

> "Whether the severity of penalties for noncompliance with a State statute renders it

> unconstitutional under the Fourteenth Amendment will not be considered in an action in which the State does not ask for any penalties."

In *Gundling* vs. *Chicago*, 177 U. S., 183, one of the cases on which the appellant relies to support the contention that the so-called discretionary clause of the statute is invalid, Mr. Justice Peckham, sustaining a law which contained a provision claimed to be void because of the discretionary power lodged in the municipal authorities, said:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power to the mayor to grant or refuse. *He made no application for a license, and of course the mayor has not refused it. Non constat, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.*"

In *Wiley* vs. *Sinkler*, 179 *U. S.*, 58, it was held that a voter who does not allege that he ever was registered or made an application to be registered, but who, so far as appears, may have been entitled to apply for registration, is not in a position to impugn the constitutionality of a statute for registration on the ground that it in effect requires a longer residence in the county than is required by the Constitution of the State, and otherwise unreasonably impedes the exercise of the constitutional right of voting.

In *Chadwick* vs. *Kelley*, 187 U. S., 540, an ordinance and specifications for paving a street required the contractor to employ only bona fide resident citizens of New Orleans, as laborers. It was held that a person who was not one of the laborers excluded by the ordinance from employment could not question the constitutionality of the ordinance.

Mr. Justice Shiras said:

> "In so far as the provisions of the city ordinance may be claimed to affect the rights and privileges of citizens of Louisiana and of the other states, the plaintiff in error is in no position to raise the question. It is not alleged, nor does it appear, that he is one of the laborers excluded by the ordinance from employment, or that he occupies any representative relation to them. Apparently he is one of the preferred class of resident citizens of the City of New Orleans."

It is equally well settled that part of a statute may be void and the remainder be valid, and that the courts will uphold the valid features of the statute unless they are so inextricably bound up with the void provisions as to taint the entire mass.

Eilenbecker vs. *District Court*, 134 U. S., 31.
United States vs. *Stephens*, 100 U. S., 82.
Poindexter vs. *Greenhow*, 114 U. S., 270.
Jachne vs. *New York*, 128 U. S., 189.
Loeb vs. *Columbia Township*, 179 U. S., 472.

(b) In any event this act should be sustained, unless its invalidity appears beyond reasonable doubt,

The rule in New York is clearly stated by Chief Judge Andrews in *Sage* vs. *City of Brooklyn*, 89 N. Y., 196:

> "* * * we are to bear in mind that all acts of the Legislature are judicially construed to be within constitutional limitation is susceptible of a construction which would make them so, and that 'the court, if possible, must give a statute such a construction as will enable it to have effect.' (*Cooley's Const. Lim.* 184). That is but a corollary from the principle asserted by Mr Justice Washington in *Ogden* vs. *Saunders*, 12 Wheat., 270, and frequently repeated in subsequent cases, that 'it is but decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.'"

This doctrine has been applied in a multitude of cases, of which the following are examples:

Matter of New York Elevated R. R. Co., 70 N. Y., 327, 342.

People vs. *Equitable Trust Co.*, 96 N. Y., 387, 394.

People ex rel. *Sinkler* vs. *Terry*, 108 N. Y., 1, 7.

Rogers vs. *Common Council of Buffalo*, 123 N. Y., 173, 181.

Sweet vs. *City of Syracuse*, 129 N. Y., 316.

People ex rel. *Carter* vs. *Rice*, 135 N. Y., 473, 484

People ex rel. *Metropolitan Street Railway Co.* vs. *Tax Commissioners*, 174 N. Y., 437.

Matter of Fishway, 131 App. Div., 418.

The presumption is always in favor of the validity of a statute if the contrary is not clearly demonstrated.

Fletcher vs. *Peck*, 6 *Cranch*, 87.

It is a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole.

Atchison, Topeka & Santa Fe R. R. Co. vs. *Matthews*, 174 U. S., 96.

Every reasonable presumption must be indulged in favor of the validity of a statute when attacked as unconstitutional.

Sweet vs. Rechel, 159 *U. S.*, 386.
United States vs. *Gettysburg El. Ry. Co.*, 160 *U. S.*, 668.

The presumption is in favor of the validity of an act, and it is only when the question is free from any reasonable doubt that the court will hold the statute unconstitutional.

Union Pacific R. R. Co. vs. *United States*, 99 *U. S.*, 700.
Nicol vs. *Ames*, 173 *U. S.*, 509.
Butterfield vs. *Stranahan*, 192 *U. S.*, 492.

(c) The clause of the statute which provides, that one who proposes to engage in the business of private banking must show that he has been continuously, for a period of five years immediately preceding the date of his application, a resident of the United States, is valid.

Abundant reason for such a provision is indicated not only in the report of the New York Immigration Commission, but likewise in the report on Immigrant Banks submitted to Congress by the Federal Immigration Commission, during the present year (Senate Doc., 381; 61st Congress, 2d session, pp. 109, Appendix IV.).

It has been shown under Point I. that the carrying on of the business of private banking is not an absolute right vested in every member of the community, but that it is a privilege; that the exercise of this right may be confined to corporations; that it may be regulated by such methods as may be called for by the exercise of the police power in the public interest.

In *State of Indiana* vs. *Richcreek*, 77 *N. E. Rep.*, 1085, *s. c.* 5 *L. R. A., N. S.*, 874, cited at length under Point I. (p. 17), a similar requirement as to residence was sustained.

The New York Liquor Tax Law requires the holder of a certificate to be a citizen of the United States, and a resident of the state.

Consolidated Laws, ch. 39, sec. 21.

The Employment Agency Law requires of the applicant for a license the affidavits of two persons who have known him for five years, showing that his moral character is good.

Laws of 1904, ch. 432.

The Labor Law (chapter 14, Laws of 1909), originally enacted in 1897, provides for preferential employment on public works of citizens of the state. Similar legislation was considered by this court in

Chadwick vs. *Kelley*, 187 U. S., 540.

It is a uniform requirement for admission to the Bar that the applicant shall be a citizen of the

United States and for a time at least a resident of the State in which he seeks to practice.

A similar requirement has been sustained with regard to the practice of medicine, it having been held in *Dent* vs. *West Virginia,* 129 *U. S.,* 114, that a provision of a statute which required every practitioner of medicine to obtain a certificate from the State Board of Health that he is a graduate of a reputable college of medicine, or that he has practiced medicine in the State *continuously for ten years* prior to March 18, 1881, or that he has been found upon examination to be qualified to practice medicine, and which subjected a person practicing without such certificate to prosecution and punishment for a misdemeanor, did not, when enforced against a person who had been a practicing physician in the State for ten years without a diploma, deprive him of his liberty without due process of law. Mr. Justice Field said:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. * * * But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well

as of deception and fraud. * * * Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. * * *

"There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met, and it is made enforceable in the mode usual in kindred matters; that is, by regular proceedings adapted to the case."

The case of *Yick Wo* vs. *Hopkins*, 118 *U. S.*, 356, so much relied upon by the complainants, was distinguished in the case cited.

Surely there is a broad distinction between the business of carrying on a laundry, which was the subject of consideration in *Yick Wo* vs. *Hopkins*, and the carrying on of the banking business. In the one case there is no question of trust and confidence; there is no likelihood of injury by loss and deception; there can be no such general suffering and injury resulting from failure or flight, as in the case of a banker entrusted with the small earnings of the most helpless members of the community; and, consequently, it must be within the power of the Legislature to say that one conducting a business which bears with it the potentiality of so

much mischief, if misdirected, or if made the instrumentality of fraud, should reside in this country for a sufficient length of time to enable it to be determined whether he is possessed of such character and standing as to make it proper for him to carry on such a business.

Otherwise, an Italian bandit, a Russian fugitive from justice, a Parisian Apache, a Berlinese confidence man or a Galician visionary may, on the very day he lands here, open a private bank without let or hindrance. There is no more reason why he should be permitted to do this than to practice law or medicine or to open a saloon.

Such a provision is not a discriminating law, as against non-residents of the United States, but is a police regulation which, under the facts indicated, was not only reasonable but necessary.

In the recent case of *Commonwealth* vs. *Hana,* 81 *N. E. Rep.,* 149 *s. c.* 11 *L. R. A., N. S.,* 799, it was held by the Supreme Court of Massachusetts that a State, in the exercise of its police power, may restrict the granting of peddlers' licenses to citizens and to those who have declared their intentions to become such.

Distinguishing *Yick Wo* vs. *Hopkins,* Chief Justice Knowlton said:

> "The requirement * * * that before receiving a license the applicant shall file a certificate from the mayor of a city or of the majority of the selectmen of a town that to the best of his or their knowledge and belief he is of good repute for morals and integrity is a reasonable regulation for the protection of the public. If in the same interest the legislature deems it important that licenses shall be granted only to

citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect. Upon a similar question in reference to the granting of licenses to sell intoxicating liquors, decided in Trageser *vs.* Gray, 73 Md., 250, 9 L. R. A., 780, the court used this language: 'It is thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, may reasonably be supposed to have a regard for its welfare, or who, not being natives, have, as required by the naturalization law, proven by credible testimony before a court of justice that they were attached to the principles of the Constitution of the United States and were well disposed to their good order and happiness. It was certainly the function of the lawmaking department to exercise its judgment on this question, and this court has no right to criticize its conclusion.' The opinion then goes on to say that the right so to legislate is within the police power reserved to the states, and after a full discussion, to declare that it is not at variance with the Fourteenth Amendment to the Constitution of the United States. The same reasoning is equally applicable to the granting of licenses to hawkers and peddlers. Indeed, the nature of their business is such that their possession of a domicile and citizenship in this country might be important to those seeking remedies for wrongs done in their business."

The suggestion that a United States consular officer, or a citizen, who may have been in Europe for a number of years, would be deprived of the right to engage in this business by reason of that fact, fails to give due regard to the legal significance of the word residence. Such a person would not, by his absence, lose either his citizenship or his residence in the United States, even to the extent of depriving him of his right to vote, although under the New York Constitution residence for voting purposes is expressly required.

It is also to be noted that the residence called for by this act is not residence in the State, but in the United States, and that the act is liberal to the extent of not requiring citizenship, although in other legislation to which attention has been called citizenship is made a condition upon the right of carrying on various occupations.

(*d*) *The provision in the act, to the effect that, after notice of application for a license has been posted, the Comptroller may, in his discretion, approve or disapprove the application, does not confer the arbitrary power of rejection. The discretion conferred is a legal discretion, which must be reasonable.*

It must be borne in mind that the applicant must present to the Comptroller a written statement verified by the individual or members of the firm making the application showing (1), the amount of assets and liabilities of the applicant; (2), designating the place where the applicant proposes to carry on business; (3), the residence of the applicant during the preceding five years. This statement must be accompanied (4), by the deposit of $10,000 in money or securities, and (5) by a bond in a penalty fixed by the Comptroller not exceeding $50,000 or

the deposit of money or securities in lieu thereof, as a protection to depositors, etc., in case of insolvency. This application is to be posted in a place accessible to the public for two weeks, and is then to be acted upon by the Comptroller, certainly not arbitrarily, but *quasi*-judicially; not capriciously, but in good faith; the exercise of which is certainly to be presumed on the part of an elective sworn State official, charged with the performance of an important public function.

Here the discretion conferred was not one dependent upon the arbitrary exercise of the official will, but was confided to a constitutional officer to be used "in the legal sense of the term." This clearly differentiates this case from *Yick Wo* vs. *Hopkins*, where Mr. Justice Matthews laid stress on the fact that "a naked arbitrary power to give or withhold consent" was not only conferred, but exercised. He further said, in language italicized in Appellant's Brief (p. 22), "The power given to them (the ministerial officers) is not confided to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

This proposition has been so fully considered in *People ex rel. Lieberman* vs. *Van de Carr*, 199 U. S., 552, affirming 81 App. Div., 128 and 175 N. Y., 440, that the opinion of Mr. Justice Day leaves nothing further to be said, beyond reference to the fact that the opinion carefully considered *Yick Wo* vs. *Hopkins* and *Gundling* vs. *Chicago*, the two cases principally relied upon by the complainant.

In *People ex rel. Lieberman* vs. *Van de Carr*, *supra*, Mr. Justice Day said:

> "The contention of counsel for appellant is not that a business so directly affecting the health of the inhabitants of the city as the fur-

nishing of milk may not be the subject of regulation under the authority of the State, but that the Court of Appeals of New York has sustained this right of regulation to the extent of authorizing the board of health to exercise arbitrary power in the selection of those it may see fit to permit to sell milk under the section quoted; and thus construed it works the deprivation of the plaintiff in error's liberty and property without due process of law. We do not so understand the decision of the highest court of New York. As we read it, the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion. In the opinion of the Appellate Division, whose judgment was affirmed in the Court of Appeals, it was said:

"'Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer, and refuse a license to another similarly situated, undoubtedly it would be invalid; but such was not its purpose, nor is that its fair construction. It is unnecessary now to determine whether the action of the board in refusing or revoking such a permit would be judicial and thus reviewable by mandamus or certiorari, or whether, if the authority should be arbitrarily or improperly exercised, the only remedy would be an application for the removal of officers; for those are questions that may arise in the administration of the law, but do not go to its validity. The section, properly construed, does not permit unjust discrimination, and, therefore, it is valid.'

"The Court of Appeals, affirming the decision of the Appellate Division, did not speak

with equal emphasis upon this point, but it leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion. While that court held that the discretion to grant or withhold permits might be vested in a board of health with opportunities to know and investigate local conditions and surroundings, it further said:

"'In the case before us the requirement of section 66 of the sanitary code that the relator should not sell milk without a permit is reasonable and violates neither Federal nor State Constitution, is in accordance with law and long-established precedent. * * * It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law.'

"We do not think that this language leaves any question as to disposition of the highest court of New York to prevent the oppression of the citizen, or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the States have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the States to protect the health and safty of its people there can be no doubt."

Citing—

Davis vs. *Massachusetts*, 167 U. S., 43.
Wilson vs. *Eureka City*, 173 U. S., 32.
Gundling vs. *Chicago*, 177 U. S., 183.
Jacobson vs. *Massachusetts*, 197 U. S., 11.
Fischer vs. *St. Louis*, 194 U. S., 361.

Mr. Justice Day continues:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of State authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Fderal Court."

After citing various cases in support of the conclusion reached, Mr. Justice Day says:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of State authority, this Court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal Court. Yick Wo *vs.* Hopkins, 118 U. S., 356. * * * We have, then, an ordinance which, as construed in the highest court of the State, authorizes the exercise of a legal discretion in the granting or withholding of permits

> to transact a business, which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law."

In *Yick Wo* vs. *Hopkins*, it affirmatively appeared that applications were made by the various Chinese laundrymen of San Francisco for permission to carry on their business, and that such permission had been arbitrarily refused to all of them; although it is to be inferred that similar applications by white persons were granted. In fact, the Court found that the evidence showed that the ordinances when put in actual operation had been so exclusively directed against Chinese laundrymen, as to force the conclusion that whatever may have been their intent, when adopted, "they were applied by the public authorities charged with their administration * * * with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the law which is secured to the petitioners." A case of actual illegal discrimination was, therefore, presented to the Court for adjudication, and not a mere moot question, such as is now sought to be injected into this case in the face of the affirmative declaration of the Supreme Court, that discretionary power may be vested in administrative boards in cases like the present.

This was made clear by Mr. Justice Field in *Crowley* vs. *Christensen*, 137 U. S., 92-91.

In 2 *Willoughby on the Constitution*, 1294, the author referring to this decision, says:

> "Taken by itself the language of the Court, as will be seen by the quotations which have

been made, indicates a view that in no case may an arbitrary discretionary power be granted to a public official which will compel any person 'to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another.' The force of this holding is, however, somewhat weakened by the fact that, as has been seen, the court found that, whatever the terms or intent of the ordinances in question, they had actually been administered in a grossly partial and unjust manner. And also, and more importantly, in the later case of *Wilson* vs. *Eureka City* (173 U. S., 32), the court expressly upheld the constistutionality of an ordinance committing the right of the plaintiff with reference to the removal of a building owned by him, to the unrestrained discretion of a single official. The summary of cases in the State courts, given by the court in *Re Flaherty* (105 *Cal.*, 558), in which unrestrained discretion is sustained, is quoted with approval, the Court declaring the discretionary power to be 'based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of the plaintiff in error."

The opinion of Mr. Justice McKenna in *Wilson* vs. *Eureka City* (*supra*), quoted with approval the following summary of the cases as formulated by Mr. Justice McFarland in *Re Flaherty* (*supra*):

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (Pedrick *vs.* Bailey,

12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (Commonwealth *vs.* Abrahams, 156 Mass., 57), or upon the common or other grounds, except by the permission of the city government and committee (Commonwealth *vs.* Davis, 140 Mass., 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (Vance *vs.* Hadfield, 22 N. Y., 858, 1003; 4 N. Y. Supp., 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectment may in writing designate (Sawyer *vs.* Davis, 136 Mass., 239; 49 Amer. Rep., 27); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (Hine *vs.* The City of New Haven, 40 Conn., 478); authorizing harbor masters to station vessels and to assign to each its place (Vanderbilt *vs.* Adams, 7 Cow., 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (Nightingale, petitioner, 11 Pick., 168); forbidding the keeping of swine without a permit in writing from the board of health (Quincy *vs.* Kennard, 151 Mass., 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (Commissioners, etc., *vs.* Covey, 74 Md., 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy (Commonwealth *vs.* Brooks, 109 Mass., 355)."

The reference to section 29-e, in support of the contention that an arbitrary discretion was vested in the Comptroller, lacks persuasiveness. That section provides:

> "Nothing in this article contained shall be construed to require the comptroller to make any inquiry or examination as to the responsibility or solvency of any applicant for a license or of any licensee hereunder."

It will be seen from an examination of the act that, but for such a provision, it might be argued that the Comptroller, in granting a license or in permitting a license to continue in business, after it might be deduced from his statement that he is irresponsible or insolvent, might subject himself to severe criticism in the event of a subsequent failure of the person licensed. It was for the purpose of relieving the Comptroller from this possible criticism that this clause was inserted in the act, at his instance, and not for the purpose of giving him an arbitrary discretion in respect to the refusal of licenses.

Far from indicating the purpose of investing the Comptroller with the arbitrary discretion of disapproving of any application for a license, it tends to favor the applicant, because the Comptroller, being relieved from the duty of making an inquiry or investigation of a searching character as to responsibility and solvency, will be more disposed to err on the side of liberality than he would if chargeable with the onerous duty of making an infallible decision on those points.

This clause does not, as appellant erroneously argues on pages 30 and 31 of his brief, either preclude the Comptroller from investigating the applicant's responsibility and solvency, or to ignore them

He is simply freed from the obligation of making such investigation. He is not "required" to make it; but is nevertheless in a position to pass on the question.

As a matter of fact, the insertion of this clause to some extent makes the performance by the Comptroller of his duties automatic. Being under no obligation to make any inquiry or examination to test the responsibility or solvency of an applicant, if the papers presented to the Comptroller and the securities and bond offered, indicate a formal compliance with the terms of the act, the granting of a license would ordinarily follow as a matter of course. There certainly is nothing in the language quoted which reasonably construed would confer upon the Comptroller despotic power.

That the discretion conferred on the Comptroller is not to be exercised capriciously is further indicated by section 26 which relates to the revocation of a license where issued, which must be "for cause shown." This phrase has a well-settled meaning in the jurisprudence of New York, and negatives arbitrary action.

People ex rel. *Munday* vs. *Fire Commissioners*, 73 N. Y., 445.
People ex rel. *Mayor* vs. *Nichols*, 79 N. Y., 582.

While we insist that the Comptroller has no arbitrary discretion to grant or withhold a license, he must and should nevertheless be vested with some discretion on the subject; otherwise he might be compelled to issue a license to a person of established bad character, one convicted of crime, an embezzler or a perjurer, or a person whose license may have been once revoked for gross misconduct or for some other justifiable reason. So, too, the applicant

may be a minor, or an insane person, or one engaged in an illegal business, like that of maintaining a bucket-shop, a poolroom, or the sale of lottery tickets. Surely the public welfare demands that, to this extent at least, the Comptroller should be vested with the discretion of disapproving an application for a license.

Mr. Justice Bijur, of the N. Y. Supreme Court, in the opinion, since reversed, which is appended to the appellant's brief, expresses the belief that the Comptroller is vested with a purely arbitrary discretion, and that, therefore, the act is void, because there is no indication of any test or standard by which the discretion of the Comptroller is to be exercised or controlled.

On the contrary, the statute expressly specifies the very steps that must be taken by the applicant before he can secure a license, and clearly indicates that if these steps are complied with, and, on the facts shown, it is reasonable that a license should be granted, the courts would compel the granting of a license, the discretion conferred being a judicial rather than an arbitrary discretion. The very fact that public notice is to be given of the application, and that a period of two weeks must elapse before action by the Comptroller, to enable proper investigation to be made and proof to be furnished, is an absolute indication that nothing was more remote from the intention of the Legislature than to confer on the Comptroller the power, arbitrarily and capriciously, to disapprove of an application, irrespective of the merits of the applicant and his compliance with the statutory requirements and conditions.

In *Yick* vs. *Hopkins* there was absolutely no test or standard of any kind, and in the administration of the ordinance there involved, the action of the

public authorities was concededly arbitrary and discriminatory. The actual exercise of such discrimination was the basis of the decision rendered in that case.

The ordinance in *Baltimore* vs. *Nadake,* 49 Md., 217, was arbitrary, giving to the mayor the absolute right to prohibit the use of a steam engine. The case was not decided on constitutional grounds; and when read in conjunction with the decision of this Court in *Wilson* vs. *Eureka City* (supra) and the cases cited in this opinion, will be found not to have any material bearing upon the present case.

This statute is certainly more specific in the indication of a test or standard to guide the discretion of the Comptroller than was the ordinance which was involved in *People* ex rel. *Lieberman* vs. *Van de Carr,* the validity of which was recognized in all of the courts which had occasion to pass on it. Official good faith is a sufficient standard, under our form of government, in the case of an elective State officer, as it is with respect to the exercise of their discretionary powers, by the members of our judiciary.

III.

The act does not deprive the complainant and those similarly situated of the equal protection of the law. The exceptions contained therein constitute a legitimate exercise of the right of classification. All persons coming within the class to which the complainant belongs are accorded like treatment, and there is no discrimination among the members of any of the classes enumerated in the act.

Before proceeding to a detailed discussion of this proposition attention is now invited to the excerpts from the report of the New York Immigration Commission to be found in the Appendices, as indicating the history and purpose of this legislation and the reason for the classification which it creates.

It was on the basis of the facts found in this report, and of the recommendations made as a result of protracted investigation and conferences with the various interests affected, and especially the most important of the private bankers dealing with immigrants, that the Act now challenged was enacted.

The members of the Commission although not unanimous in all of their recommendations, were of one mind on this subject, Mr. Justice Whitney, who dissented from some of the general recommendations, being especially emphatic in his approval of the conclusions on the subject of private banking.

It is well settled, that a court may refer to the public history of the times, and to legislative documents, to ascertain the reason of an enactment as well as the meaning of particular provisions therein, and to that end may consider the evil which it is designed to remedy, contemporaneous events, and the existing situation with regard to the subject matter of the legislation as it was pressed upon the attention of the legislative body.

Tenement House Commission vs. *Moeschen*, 179 N. Y., 325.

United States vs. *Union Pacific R. R. Co.*, 91 U. S., 72, 79.

Platt vs. *Union Pacific R. R. Co.*, 99 U. S., 60.

Holy Trinity Church vs. *United States*, 143 U. S., 643.

The Delaware, 161 U. S., 472.

Shaw vs. *Kellogg*, 170 U. S., 331.

McLean vs. *Arkansas*, 211 U. S., 339.

The Delaware, *supra*, involved the interpretation of the Harter Act, which regulated the liability of vessels. In investigating the meaning of the act, Mr. Justice Brown said:

> "The exigencies which led to the passage of the act are graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury and embodied in the report of the Committee on Interstate and Foreign Commerce of the House of Representatives. As a part of the history of the times, this is a proper subject of consideration."

The opinion then proceeds to quote copiously from the report.

In *Holy Trinity Church* vs. *United States* (supra), which involved the interpretation of the Contract Labor Law, Mr. Justice Brewer said:

> "The singular circumstance throwing light upon the intent of Congress is found in this extract from the report of the Senate Committee on Education and Labor recommending the passage of the bill."

Then follow extracts from the Committee report.

This practice has been approved in New York, most recently in the oft-cited case of *Musco* vs. *United Surety Co.*, 196 N. Y., 465, where the Court, considering the public reasons which actuated the passage of the Wells Law (chap. 185, Laws of 1907), referred to the same report of the Commission of Immigration to which reference is now made, although that report was not rendered until nearly two years subsequent to the passage of the Wells Law, Judge Hiscock saying:

> "We doubtless may take judicial notice of the public report made by the Commission of Immigration recently appointed by the Governor to inquire into the condition and welfare of aliens in this State, and by which report it appears that there has been a disposition on the part of ignorant aliens to deposit for transmission abroad moneys with irresponsible persons, etc."

Attention is also directed to the report of the Federal Immigration Commission on the subject of Immigrant Banks submitted to the United States Senate by Senator Dillingham, the Chairman of the Commission (Sen. Doc. No. 381, 61st Congress, 2d session, and also to a report on Irresponsible Banking, published in 1908 by the Chamber of Commerce of Cleveland, Ohio.

The complainant's contention in support of this branch of his attack, is, in brief, that the exceptions contained in Section 29-d of the act are discrimin-

atory, and that, therefore, the operation of the act involves such inequality as to constitute an infraction of the Fourteenth Amendment of the Constitution of the United States. This is confidently denied.

Secton 25 of the act reads:

> "Except as provided in section twenty-nine-d, no individual or partnership shall hereafter engage directly or indirectly in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another or for any other purpose in cities of the first class without having first obtained from the Comptroller a license to engage in such business."

It will be seen from this initial provision that the act is directed against "individuals and partnerships," and that corporations are not comprehended within its terms. This was for the obvious reason indicated by Section 22 of the General Corporation Law of New York, to which reference has already been made, which in express terms prohibited all corporations, except a corporation formed under or subject to the banking laws, even by implication or construction, to exercise banking powers, including those of discounting bills, notes or other evidences of debt, of receiving deposits or buying or selling bills of exchange, or issuing bills, notes or other evidences of debt for circulation as money.

The Banking Law made explicit provision with regard to the exercise by corporations of banking powers and carrying on the business of banking in its several branches. It was intended that Chapter 348 of the Laws of 1910 should in no wise militate against this declared policy of the State. In fact there was a strongly expressed desire by various public officers that the business of banking should be confined entirely to corporations.

This act, therefore, in so far as it permits banking still to be carried on by private individuals, is in mitigation of what otherwise might have been the rigor of a uniform rule, placing all, whether individuals and corporations, engaged in the business of banking in the same category, and making applicable to all of them the restrictions, conditions and qualifications contained in the Banking Law.

This purpose was emphasized by the use of the word "individual" in Section 25 of the act, as distinguished from the word "person," in view of the fact that under Section 37 of the General Construction Law the term "person" includes a corporation and a joint stock association.

People vs. *Woodbury Dermatological Institute*, 192 N. Y., 454.

Section 29-d should therefore be read in the light of this explicit limitation of the operation of the act. It provides:

> "The foregoing provisions shall not apply (1) to any corporation or 'individual banker' authorized to do business under the provisions of the banking law, nor to any association organized under the national banking act; nor (2) to any hotelkeeper who shall receive money for safe-keeping from a guest; nor (3) to any express company or telegraph company receiving money for transmission; nor (4) to any individual or partnership receiving money on deposit for safe-keeping or for transmission to others, or for any other purpose, where the average amount of each sum received on deposit, or for transmission, by such individual or partnership in the ordinary course of business, during the fiscal year preceding the date of the affidavit hereinafter specified, shall be not less than five

hundred dollars, proof of which fact by affidavit to the satisfaction of the comptroller shall be made by the individual or a member of the partnership seeking exemption hereunder whenever thereunto requested by the comptroller; nor (5) to any individual or partnership who would otherwise be required to comply with section twenty-five of this article who shall file with the comptroller a bond in the sum of one hundred thousand dollars, approved by the comptroller as to form and sufficiency, for the purpose and conditioned as in said section prescribed, where the business is conducted in a city having a population of one million or over and if conducted elsewhere in the state such bond shall be in the sum of fifty thousand dollars; or in lieu thereof money or securities approved by the comptroller of the same amount. The provisions of section twenty-nine-a shall be applicable to such bond, or deposit of money or securities."

Before considering the authorities bearing upon this phase of the case, it will be useful to consider the five classes to which the act is declared not to be applicable.

(1) "Any corporation or 'individual banker' authorized to do business under the provisions of the banking law, nor to any association organized under the National Banking Act."

This is but a repetition of the idea which is unambiguously expressed in section 25, that the act has no relation to corporations, whether organized under the State Banking Act or the National Banking Act; nor to "individual bankers" who are authorized to do business under the Banking Law, who have always been distinguished in the history of banking in the State of New York from private bankers.

The term "individual banker" as used in the statutes denotes a person who, having complied with the statutory requirements, has received authority from the Banking Department to engage in the business of banking; "private bankers" are persons or firms engaged in the business of banking without any special privileges or authority created by statute; the terms have separate and independent meanings.

People vs. *Doty*, 80 N. Y., 225.
Perkins, vs. *Smith*, 116 N. Y., 441.

In section 2 of the Banking Law the term "individual banker" is defined in accordance with the authorities just cited.

Although the insertion of this clause was unnecessary, it was deemed proper out of abundance of caution, so that there might be no possibility of misinterpretation.

(2) "Any hotel-keeper who shall receive money for safe-keeping from a guest."

Such a receipt of money is clearly not private banking, within any accepted interpretation of that term. It is an incident to the common law liability imposed on an inn-keeper of responsibility for the money of his guest.

This has been supplemented by legislation (*Laws of* 1855, chap. 421, sec. 1, as subsequently amended, and which now constitutes *Sec.* 200 *of the General Business Law*). This section contemplates, that the proprietor or manager of a hotel shall provide a safe in his office "for safe-keeping of any money, jewels or ornaments belonging to the guests of * * * such hotel"; and also contemplates that such hotel-keeper may, by notifying the guests thereof by posting a notice stating that such safe is supplied, limit his liability in case of loss, where the guest neglects

to deliver his money, jewels or ornaments to the hotel-keeper for deposit in his safe.

It is further provided that no hotel-keeper shall be obliged to receive property on deposit for safe-keeping exceeding $500 in value.

There is thus a statutory recognition of the right of a hotel-keeper to receive deposits of money of his guests for safe-keeping, and, consequently, although not necessary, it was proper that the act now under consideration should not interfere with a classification which had been recognized as desirable for upwards of half a century.

(3) "Any express company or telegraph company receiving money for transmission."

Here again the act refers to corporations, as distinguished from individuals. Even in the absence of this clause, the act would not have been applicable to an express company or telegraph company.

Moreover, it is well known that express companies and telegraph companies have for many years been engaged in receiving money for transmission merely, and have performed a useful function in that regard without loss or risk to those delivering money to them for transmission. None of the abuses which have been pointed out in the report of the Immigration Commission has ever existed in the case of these companies, and both express companies and telegraph companies come within the regulative provisions of the Public Service Commissions Laws as amended at the New York legislative session of 1910; express companies coming within the definition of common carriers as defined in subdivision 9 of section 2 of that act, and telegraph companies having been brought within its purview by a recent enactment (Laws of 1910, ch. 480, sections 90-103).

So far as these corporations, therefore, require supervision and regulation, it is amply provided in the legislation of this State.

(4) "Any individual or partnership receiving money on deposit for safe-keeping or for transmission to others, or for any other purpose, where the average amount of each sum received on deposit, or for transmission by such individual or partnership in the ordinary course of business, during the fiscal year preceding the date of the affidavit hereinafter specified, shall not be less than five hundred dollars, proof of which fact by affidavit to the satisfaction of the comptroller shall be made by the individual or a member of the partnership seeking exemption hereunder, whenever thereunto requestd by the comptroller.";

(5) "Any individual or partnership who would otherwise be required to comply with section twenty-five of this article who shall file with the comptroller a bond in the sum of one hundred thousand dollars, approved by the comptroller as to form and sufficiency, for the purpose and conditioned as in said section prescribed, where the business is conducted in a city having a population of one million or over and if conducted elsewhere in the state such bond shall be in the sum of fifty thousand dollars; or in lieu thereof money or securities approved by the comptroller of the same amount."

The purpose of these provisions was, to differentiate the several classes of private bankers who were engaged in business in the State. The reports of the Immigration Commission shows, that the abuses sought to be cured existed principally in the case of banks dealing with small depositors, largely with immigrants and aliens, and in charge of individuals more or less irresponsible and incompetent, whose customers were ordinarily unable to protect

themselves or to exercise discretion in the selection of a banker.

The class of private bankers specified in the clause 41 now under consideration, consists of those receiving money on deposit or for transmission in large sums, the average amount of each sum received being not less than $500. This shows on its face that both the depositors and bankers contemplated, were those accustomed to deal in large sums, and, therefore, presumptively able to exercise care and caution. It was believed that, in the case of such bankers and depositors, the protective provisions of the act were unnecessary. Thus, for instance, to place Acritelli, the Italian banker whose deposits were of the character indicated in Appendix XXIX. (*p. 194 of the Report of the Commission of Immigration, p. 153,* infra), or the notorious Zotti, whose $600,000 of liabilities were distributed among 8,000 depositors (p. 152, infra), in the same class with J. P. Morgan & Company, or any other of the great private bankers of New York, would be an absurdity. While in the one case supervision and regulation is imperatively demanded, in the other it would be quite unimportant.

The appellant, however, contends that all bankers constitute a single class. That would place in one category national and state banks, and private banks. It would make it impossible to make any subclassification based on the character of the business conducted by banks, or on the locality in which they carry on their business, or on the customers with whom they deal. This, as will be presently shown, is an erroneous conception.

The appellant likewise misconceives the theory of the classification contained in this act which is not dependent on the wealth, or volume of business of the banker, but on the nature of the deposits made

by his customers; in other words, not upon the extent, but on the character of his business.

In like manner, a private banker able to give security, by the deposit of money or its equivalent or by filing a bond as required in this act, to the extent of $100,000 is likewise in a different class from the ordinary private banker against whom protection is required.

It is to be noted, however, that the provision with regard to the giving of security to the amount of $100,000 in cities of the first class, and of $50,000 in cities of the second class, is made applicable to any and all private bankers, so that the complainant in this case, and any other individual engaged in the business specified in the act, can, by giving such security, be relieved from all further obligations imposed on private bankers by the act. In other words, it is left to the option of every private banker whether, by giving security to the amount of $100,000 in cities of the first class, or $50,000 in cities of the second class, he will seek to be relieved from all further obligations under the act. If he elects not to give this bond, then he is required to comply with the provisions of the act. The choice is left to him entirely.

There is thus a clearly defined legislative reason, based on the results of careful investigation, underlying each of these several clauses, which are now claimed by the complainant to constitute discriminatory provisions and to subject the act to the objection, that the protection which it affords is unequal.

While it is confidently believed that the reasons which prompted the legislature in making the classifications contained in the act, were sound from the standpoint of public policy, and cannot be success-

fully challenged as being either unreasonable, unfair or oppressive, we insist that even though the Court might not be entirely in accord with the legislature as to the soundness or wisdom of its enactment, the legislature did not transgress the constitutional boundaries of classification, and, consequently, did not violate the equal protection clause of the Constitution.

The Right to Classify.

The discussion of the authorities may be well introduced by a quotation from the opinion of Judge Vann in *People* ex rel. *Farrington* vs. *Mensching*, 187 N. Y., 8, 16:

> "We adhere without qualification to the decision made when the act of 1905, was before us and broadly indorse the reasons given to support the judgment then rendered. (People *ex rel.* Hatch *vs.* Reardon, 184 N. Y., 431.) We held that 'The legislature has power to classify as it sees fit by imposing a heavy burden upon one class of property and no burden at all upon others,' provided 'all persons and property in the same class are treated alike' and 'the tax is imposed equally upon all property of the class to which it belongs.' In discussing the subject we said that: 'While a tax upon a particular house or horse, or the houses or horses of a particular man, or on the sale thereof would obviously invade the constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature * * *. The equal protection of the laws 'only requires the same laws and methods to be applied impartially to

all the constitutents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' (Kentucky Railroad Tax Cases, 115 U. S., 321, 337.) Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' (Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 283, 293; Hayes *vs.* Missouri, 120 U. S., 68; Barbier *vs.* Connolly, 113 U. S., 27, 32). * * *

"Possibly a valid distinction might be founded on the nature or object of the corporation, or on the fact that it enjoyed special privileges, putting banking and railroad corporations in and leaving manufacturing corporations out, for instance, but we think none can rest on an accidental and non-essential quality without the violation of fundamental principles. While the Legislature has wide latitude in classification its power in that regard is not without limitation, for the classification must have some basis, *reasonable or unreasonable,* other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it *even if it is a poor one.* While the State can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes and black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, *or even a class made of race horses,* owing to the use

made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, although specious and unsound, for taxing Holstein bulls and no others, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction? A classification of dealers in cigarettes into those selling at wholesale without the State and those selling at retail within the State was sustained on the ground that the two classifications are distinct (Cook *vs.* Marshall County, 196 U. S., 261, 274), but could dealers in any commodity be classified according to age, size or complexion? A classification of sales into those made in an exchange and those made elsewhere was sustained in another case, but could exchanges be so classified as to tax only such sales as are made in those carried on in brick buildings? (Nicol *vs.* Ames, 173 U. S., 509.) * * *

"The rule governing the subject, as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be 'mere arbitrary selection.'

"By this we do not understand that great Court to mean that the relation must necessarily be 'reasonable and proper' according to the judgment of reviewing judges, but that the Court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words,

there must be enough reason for it to support an argument, *even if the reason is unsound.*"

Illustrations of the Exercise of the Right.

The argument might be rested upon this decision and the authorities which it cites. So much stress is, however, laid by the appellant on this point, which evidently impressed Mr. Justice Bijur, that, at the risk of wearying the Court, a number of decisions of this Supreme Court and of the New York Court of Appeals, many of them involving classifications based on far less obvious reasons than those which here obtain, will be summarized by way of illustration of the signification which has been placed on the phrase "the equal protection of the laws."

(1) *The Musco Case.*

First of all, attention is again called to *Musco* vs. *United Surety Co.*, 132 App. Div., 300, affd., 196 N. Y., 459, which involved the constitutionality of chapter 185 of the Laws of 1907, the so-called "Wells Law," entitled "An Act to regulate the taking of deposits by certain persons, firms and corporations."

The act, after making various provisions of general application, concluded with a section, reading: "This act shall not apply to drafts, money orders and travelers' checks issued by transatlantic steamship companies or their duly authorized agents, or to national banks, state banks, or trust companies."

It was argued that this clause constituted improper discrimination. The Court, however, disregarded the objection, Mr. Justice Houghton saying:

> "Nor in our opinion is the law unconstitutional because transatlantic steamship com-

panies and their agents and National and State banks and trust companies are exempted from giving the bond when issuing drafts, money orders and travelers' checks, National banks are regulated by Federal laws, and State banks and trust companies by laws of the State, all tending to insure honest dealing with customers and safety in money transactions. A transatlantic steamship company necessarily has large capital invested and large assets, and for certain kinds of contracts is, under the Maritime Law, under stringent liability. The Legislature had the right to say that National and State banks and trust companies and transatlantic steamship companies needed no further regulation for the purpose of guarding against fraud and embezzlement. It might have been wisdom on the part of the Legislature to have included the exempt corporations, instead of excluding them, and to have compelled all to give a bond, but the fact that they were excluded does not impair the law. A law is not rendered unconstitutional as in violation of the equal rights clause because the Legislature did not include all that it might have included or condemn all acts that it might have condemned. It had the right of judging what it deems harmful or what it deems should be safeguarded, and need not include all harmful acts or guard against everything that apparently needs guarding. All that the Federal Constitution (Fourteenth Amendment, sec. 1) requires it shall do is that it shall not deny to any person the equal protection of the law. While the State Legislature cannot make an arbitrary classification, yet if the classification be reasonable and the law deals alike with all persons of a certain class, it is not obnoxious and is not a denial of

equal protection of the law (*Hathorn* vs. *National Carbonic Gas Co.*, 194 N. Y., 326, 346). In view of the safegurads already existing by law affecting the exempted corporations tending to insure honest dealing, it was not unreasonable to exempt them and create a general class made up of all persons, corporations and firms engaged in the business of selling steamship or railroad tickets for transportation to or from foreign countries, and to require them, if they desired to add to their business that of receiving deposits of money for the purpose of transmitting the same to foreign countries, to give the bond prescribed for the purpose of guarding against fraud, imposition and embezzlement. All of the class created are affected alike, and, the classification being reasonable, the law is not unconstitutional."

On appeal to the Court of Appeals this decision was affirmed (196 N. Y., 466), Judge Hiscock saying:

"The act does not improperly discriminate against the class to which apellant's principal belonged and in favor of others, because by the provision in section 6 thereof that it 'shall not apply to drafts, money orders and travelers' checks issued by transatlantic steamship companies or their duly authorized agents.' It is quite probable that if necessary we could find sufficient reason to justify the Legislature in distinguishing between transatlantic steamship companies, *almost necessarily possessing large capital and credit*, and individuals of the class to which appellant's belongs, who frequently might be expected to be without either. But in is not necessary to do this. When section 6 provided that the act should not apply to the

things therein mentioned, it but declared what would have been the meaning and construction of the statute without any specific provision. On the face of the statute we should not interpret its provisions regulating the business of receiving deposits as apply to the sale and issue of drafts, money orders and travelers' checks. The former in the ordinary conduct of the business would involve quite different operations than those implied in the latter branch of business."

(2) *Cases Involving Taxation and Licenses.*

Beginning with the important subject of taxation, the classic language of Mr. Justice Bradley in *Bell's Gap R. R. Co.* vs. *Pennsylvania,* 134 U. S., 232, has been followed by a long line of decisions:

"The provisions of the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the

people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society demand, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt."

In *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337, a Kentucky statute providing for the assessment of a railroad property for purposes of taxation in a mode different from that prescribed as to ordinary real estate, or as to property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies, was sustained, the Court declaring that "the rule of equality in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents *of each class*, so

that the law shall operate equally and uniformly upon all persons *in similar circumstances.*"

In *Pacific Express Co.* vs. *Seibert*, 142 U. S., 339, a Missouri statute imposed a tax on the business done by express companies within the State. It defined an express company as "any person, persons, joint stock association, company, or corporation incorporated under the laws of any State * * * conveying to, from or through this State or any part thereof, money * * * or effects of any kind by express on contract with any railroad or steamboat company * * * (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this State). It was argued that this statute invidiously discriminated against the express companies defined by it in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. This contention was rejected, Mr. Justice Lamar saying:

> "The legislation in question cannot be considered as invidiously discriminating against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between companies defind by this act and railroad or steamboat companies or other companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock, and other tangible property as well as, generally, upon their franchise; and steamboat companies likewise pay a tax upon their tangible property. This tax is not necessarily an ad valorem tax at the same rate as is

paid on other private property in the State belonging to individuals. Generally, indeed, it is not, but is often determined by other means and at different rates, according to the will of the State Legislature. On the other hand, express companies such as are defined by this act, have not tangible property of any consequence, subject to taxation under the general laws. There is, therefore no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made as between express companies defined by this act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character, and means of doing business justify the discrimination in this respect which the legislature has seen fit to impose. The legislation in question does not discriminate between companies brought within the class defined in the first section; and such companies being so entirely dissimilar, in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws, and upon other and different principles, we do not see how, under the principles of the many decisions of this Court upon

the subject, it can be held violative either of the Fourteenth Amendment of the Constitution of the United States, or of the provision in the Constitution of Missouri, relating to equality and uniformity of taxation."

In *Magoun* vs. *Illinois Trust & Savings Bank*, 170 U. S., 283, 294, it was held that a graded inheritance tax law, wherein different rates of taxation were imposed based on the amount of the estate which was the subject of the tax, was within the constitutional power of the Legislature. Mr. Justice McKenna said:

> "There is * * * no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearings these considerations in mind we can solve the questions in controversy.
>
> "There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependant upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class —differences, therefore, which 'bear a just and proper relation to the attempted classification' —the rule expressed in the Gulf, Colorado & Santa Fe Railway *vs.* Ellis, 165 U. S., 150. And if the constituents of each class are affected

alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'"

In *American Sugar Refining Co. vs. Louisiana*, 179 U. S. 89, a Louisiana statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses, was held not to deny to sugar refiners the equal protection of the laws because it exempted from such tax "planters and farmers planting and refining their own sugar and molasses." Mr. Justice Brown said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. * * * So, too, this court has had repeated occasion to

sustain discriminations founded upon reasons much more obscure."

In *Cook* vs. *Marshall County*, 196 U. S., 261, 274, the Iowa Cigarette Tax Law made a distinction between jobbers and wholesale dealers in cigarettes. The validity of the law was nevertheless sustained, the Court saying:

> "There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. One sells at retail, and the other at wholesale, one to the public generally, and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturerse of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned."

In *Metropolitan Street Ry. Co.* vs. *New York*, 199 U. S., 1, involving the constitutionality of the New York special franchise tax, which was attacked because certain corporations were allowed deductions and exemptions which were not accorded to others, Mr. Justice Brewer, rejecting the criticism, said:

> "It is further insisted that the special franchise tax law denies to the relator the equal protection of the laws and due process in three separate and distinct aspects, 'namely, (1) in

that it adds to the obligations of their various contracts while preserving all the burdens of those contracts; (2) in that it provides for the deduction of annual payments covered by existing contracts from the amount of tax levied, by reason of which deduction those who agreed to pay for their franchises lump sums or annual amounts less than the new tax are discriminated against; and (3) in that it discriminates against them and subjects them to taxation, while their competitors operating under the surfaces of many of the same streets are to be exempted.'

"The first specification is answered by the conclusion that we have reached in respect to the claim of an impairment of contract obligations, for if there was no such impairment the fact that the companies have escaped the burden for these many years is their good fortune, and in no manner discharges them from the ordinary burdens of taxation which the present law imposes.

"With respect to the second, it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land, part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the Government. Further, this whole matter of allowing a reduction on account of that which is spoken of as 'in the nature of a tax' is a matter of grace on the part of the legislature. The fran-

chises granted were, as we have held, subject to taxation, and the fact that upon equitable considerations the State has consented that a certain reduction shall, in some cases be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the Federal Constitution to prevent a State from granting exemption from taxation. Bell's Gap Railroad Company *vs.* Pennsylvania, 134 U. S., 232.

"With regard to the third contention, it may be said that there is a difference between surface and subsurface street railroads sufficient to justify a diversity in the mode and extent of taxation. In Savannah, etc., Railroad Company *vs.* Savannah, 198 U. S., 392, just decided, taxation of a street railroad was challenged on the ground that a steam railroad which ran into the city and along its streets, and there did some of the same kind of work as the ordinary street railroad, was not subject to the same tax, and, referring to this contention, is this declaration by Mr. Justice Holmes: 'The difference between the two railroads is obvious and warrants the diversity in the mode oftaxation.' Further, the condition of the title to the only subsurface road in the city of New York clearly puts it in a class by itself."

In *Armour Packing Co.* vs. *Lacy*, 200 U. S., 226, a State law imposing a license tax on meat packing houses, was held not to deny the equal protection of the laws to persons engaged in such a business because a like tax was not imposed on persons engaged in the business of selling the products of such houses, or on those engaged in packing articles of food other than meat.

In *Cox* vs. *Texas*, 202 U. S., 446, a Texas liquor tax law was held not to offend against the equal protection clause because by its terms it did not apply to wines produced from grapes grown in the State while in the hands of the producers or manufacturers thereof.

In *District of Columbia* vs. *Brooke*, 214 U. S., 138, a statute distinguishing as to the methods of enforcement of taxation as between resident owners and non-resident owners, was held to be valid, Mr. Justice McKennan saying with regard to the equal protection clause which was invoked against the statute:

> "Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. Billings *vs.* Illinois, 188 U. S., 97; Heath & Milligan Manufacturing Company *vs.* Worst, 207 U. S., 338. In the light of these principles the contentions of the defendant in error must be judged. The act in controversy makes a distinction in its provisions between resident and non-resident lot owners, but this is a proper basis for classification. Regarded absolutely as human beings, regarded abstractly as lot owners, no legal dif-

ference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in St. John *vs.* New York, 201 U. S., at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in Field *vs.* Barber Asphalt Co., 194 U. S., 618, where a privilege to protest against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statutes held not to violate the equality clause of the Fourteenth Amendment."

In *Southwestern Oil Co.* vs. *Texas,* 217 U. S., 114, an occupation tax on all wholesale dealers in coal and mineral oils, was held not to deny to them the equal protection of the law because a similar tax was not imposed on wholesale dealers in other articles.

In the latest case on the subject, *Brown-Forman Co.* vs. *Commonwealth of Kentucky,* 217 U. S., 563, the classification in a Kentucky act, imposing a license tax on persons compounding, rectifying, adulterating, or blending distilled spirits, was held not a denial of equal protection because it discriminated in favor of distillers and rectifiers of straight distilled spirits. Mr. Justice Lurton said:

"We come then to the question as to whether this act makes an arbitrary and illegal discrimination in favor of other persons or corporations

engaged in the same business. The question is at last one of classification of subjects, trades or pursuits for the purpose of taxation, and concerns the power of the States to exercise discretion in the methods, subjects and rates of taxation. Fundamental to the very existence of the governmental power of the States as is this function of taxation, it nevertheless, subject to the beneficent restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of 'an iron rule of equal taxation,' nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings or occupations. This much has been over and over announced by this Court. * * * Plaintiff in error now says that it has been arbitrarily singled out and its business or occupation taxed, thereby discriminating in favor of three other classes engaged in the same business. The first class which is named as favored are distillers who neither rectify, compound, adulterate nor blend their products. Manifestly there is nothing capricious in putting the occupation carried on by the plaintiff in error in a class distinct from that of the whiskey distillers whose straight product is the basis for the manipulated product of those engaged in the taxed business. A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable con-

sideration of difference or policy, there is no denial of the equal protection of the law. The reasons for discriminating between distillers and rectifiers is not obscure, and a classification which includes one and omits the other is by no means arbitrary or unreasonable. * * *

"It is next said that distillers of other States and countries, who vend in Kentucky unrectified and unblended spirits, are untouched by the law. This is answered by what we have said as to such distillers manufacturing within the State, as well as by the obviousness of the fact that the State of Kentucky had no more right to impose an occupation tax upon a business conducted outside of the State than it had to lay a property tax upon property outside of the State. *

"Finally, it said that rectifiers and blenders of other States or countries who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the spirits of Kentucky rectifiers, or blenders, are not subject to the tax. * * *

"There is no pretense here that there has been any discrimination in favor of either the residents or the products of Kentucky, but the reverse, in that the resident rectifier is discriminated against because the product of the untaxed non-resident rectifier meets those of the taxed rectifier in competition for the trade of Kentucky. * * * Here the exaction is not upon the product at all, but upon the business of producing the product in the State. The same business carried on beyond the State could not have been subjected to a like tax. There has therefore been no arbitrary or capri-

cious discrimination against the resident rectifier."

Without going into the decisions of the various States bearing on this branch of the inquiry, we may be pardoned for referring to the case of *People ex rel. Eisman* vs. *Ronner*, 185 N. Y., 285, as indicative of State policy with regard to classification for purposes of taxation.

There it was claimed that the New York mortgage tax law denied to the holders of mortgages recorded after July 1, 1905, the equal protection of the law because a different rule of taxation was thereby applied to mortgages recorded after that date than that which applied to mortgages recorded before that date; the holder of the latter was entitled to offset his indebtedness, whereas the holders of mortgages recorded after July 1, 1905, were debarred from that right. The criticism, that classification by reference to an arbitrary date was invalid, was disregarded.

Leaving the decisions which specifically involve the consideration of the equal protection clause as applicable to tax legislation, it will be of assistance in the determination of this case, to consider various other phases of State legislation enacted under the police power, in which the limitations on this clause have been defined.

(3) *Cases Involving Classification Based on Population.*

Thus it has been held, that statutes applicable only to certain portions of the State, or to certain localities having a specified population, do not constitute an invasion of the Fourteenth Amendment.

In *Hayes* vs. *Missouri*, 120 U. S., 68, the act provided that in the trial of capital cases in cities hav-

ing a population of over 100,000 inhabitants, the State was to be allowed fifteen peremptory challenges to jurors, while elsewhere in the State it was allowed only eight peremptory challenges.

See also—

Lang vs. *New Jersey*, 209 U. S., 467.

In *Budd* vs. *New York*, 143 U. S., 517, an exact fixing the maximum charge for elevating, receiving, weighing and discharging grain was, by its terms, declared not to apply to any village, town or city having less than 130,000 population. Mr. Justice Blatchford in support of the validity of the legislation, said:

> "It is further contended for the plaintiffs in error that the statute in question violates the Fourteenth Amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies only to places which have 130,000 population or more, and does not apply to places which have less than 130,000 population, and thus operates against elevator owners in the larger cities of the State. The law operates equally on all elevator owners in places having 130,000 population or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the Fourteenth Amendment."

In *Lloyd* vs. *Dollison*, 194 U. S., 445, it was decided that a local option law does not deny to any person equal protection of the laws because the sale of liquor is by the operation of such a law a crime in certain territory and not in other territory.

In *People* vs. *Havnor*, 149 N. Y., 195, an act regulating barbering on Sunday made it a misdemeanor for any person to engage in the business or work of a barber on the first day of the week, except that in

the City of New York and in the village of Saratoga Springs such business might be carried on until one o'clock of the afternoon of that day. Meeting the constitutional objection, Judge Van said:

> "The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the Fourteenth Amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a State, nor to legislation which, in carrying out a public purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated. (Missouri *vs.* Lewis, 101 U. S., 22, 30; Barbier *vs.* Connolly, 113 U. S., 27, 31.) It was not designed to interfere with the exercise of the police power by the State for the protection of health, or the preservation of morals. (Powell *vs.* Pennsylvania, 127 U. S., 678-683.) The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. (*Hayes* vs. *Missouri*, 120 *U. S.*, 68)"

In *Commonwealth* vs. *Danziger*, 176 *Mass.*, 290, *S. C.*, 57, *N. E.*, 461, it was held to be within the police power of the state to regulate the business of pawnbrokers by requiring those engaged therein in cities or towns of 10,000 inhabitants or more to pay a license.

In *Tenement House Department* vs. *Moeschen*, 179 *N. Y.*, 325, *aff'd* 203 *U. S.*, 583, an act which required all school sinks and privy vaults in existing tenement houses in cities of the first class to be removed and replaced by individual water closets, was sustained, Judge Bartlett saying:

> "The appellant further insists that this legislation is violative of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' since the act is made applicable only to cities of the first class and to tenement houses only, while all citizens of other cities and all property owners in cities of the first class owning premises other than tenement houses are free to use school sinks.
>
> "To say that the board of health of the City of New York, in the exercise of the police power, cannot, under legislative sanction, apply different rules and regulations in a city of the first class to the densely populated tenement-house districts than to the well-conducted houses of the more favored classes, is to overlook the controlling facts and the absolute necessity of enforced changes by the exercise of the police power. The fact that the act under consideration relates only to cities of the first class does not offend the constitutional provisions upon which the appellant relies.
>
> "It is common procedure for the board of health, in the various cities of the State, to secure such grants of power from the legislature as the necessities of the particular locality may demand. An act necessary for the City of New York might not have the slightest application to Albany or Buffalo."

In *Welch* vs. *Swasey*, 214 U. S., 91, 107, an ordinance of Boston prescribing a different maximum height for buildings in different sections of the city, was sustained; although the effect of this classification was to permit A to erect a building 125 feet high on his land in one part of the city, while B, in another locality, was limited as to height.

(4) *Cases Involving Classification Based on Special Corporate Characteristics.*

Legislation applying to certain classes of corporations only, by imposing upon them burdens from which others are exempted, has been likewise sustained.

Thus an act of Kansas, entitled "An act relating to the liability of railroads for damages by fire," which required that in all actions commenced under the act, if the plaintiff should recover, he should be allowed a reasonable attorney's fee, was, in *Atchison, Topeka & Santa Fe R. R. Co.* vs. *Matthews*, 174 U. S., 96, held valid.

In *Missouri, Kansas & Texas Ry. Co.* vs. *May*, 194 U. S., 267, a law of Texas which was directed solely against railroad companies, and imposed a penalty for allowing Johnson grass or Russian thistle to go to seed upon their right of way, was sustained. Mr. Justice Holmes said:

> "The case is brought here on the ground that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States.
>
> "It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted, also, that legislation may be directed against a class when any fair ground for the discrimination

exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow, is so arbitrary as to amount to a denial of the equal protection of the laws There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch* vs. *Maryland*, 4 Wheat, 316. *When a State Legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.*

"Approaching the question in this way, we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down

pests, the railroad companies have done nothing in the matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

In *Savannah Thunderbolt, etc., Ry.* vs. *Savannah*, 198 U. S., 392, a classification which distinguished between an ordinary street railway and a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the City, was held not to constitute an unconstitutional classification.

In *St. Louis Consolidated Coal Co.* vs. *Illinois*, 185 U. S., 203, a classification of coal mines made by the Illinois statute, by which mines where not more than five men are employed at any one time are exempted from the operation of the statute providing for the appointment of State mine inspectors, whose fees are to be paid by the owners of the mines, was sustained.

In *Wilmington Star Mining Co.* vs. *Fulton*, 205 U. S., 60, the selection of mine owners upon which to impose the responsibility for the defaults of certain employees who are required by the Illinois mine act to be selected from those holding licenses issued by the State Mining Board created by that act, was held not to constitute a denial of the equal protection of the laws.

In *McLean* vs. *Arkansas*, 211 U. S., 539, an act which provided that coal should be measured for payment of miners' wages before screening in mines where ten or more miners were employed, and mak-

ing no such requirement where a lesser number were in service, was held to be valid.

(5) *Other Illustrations of a Varied Nature.*

Among the many other cases that might be cited, the following are selected for purposes of further illustration, because they present aspects which indicate how much further the Supreme Court has gone in the direction of sustaining legislation based on classification than is reqiured in the present case.

In *New York, New Haven and Hartford R. R. Co.* vs. *New York*, 165 U. S., 628, an act prohibiting steam railroads from heating passenger cars by a stove or furnace kept inside of the car or suspended therefrom, provided that the act should not apply to railroads less than fifty miles in length. This exception was held not to justify the contention that it involved discrimination against companies having more than fifty miles of railroad.

Otis vs. *Parker*, 187 U. S., 606, sustained the provision of the California Constitution, which invalidated all contracts for the sale of shares of corporate stock on margin or for future delivery, although the act did not prohibit margin transactions or contracts for future delivery with respect to objects of possible speculation other than corporate stocks.

In *Fidelity Mutual Life Association* vs. *Mettler*, 185 U. S., 308, the classification of life and health insurance companies separately from fire, marine and inland insurance companies, and mutual benefit and relief organizations doing business through lodges and mutual benefit associations, was declared not to be so arbitrary and destitute of reasonable basis as to be obnoxious to constitutional objection.

In *Lloyd* vs. *Dollinson*, 194 U. S., 445, above considered, the Ohio local option law excepted from its

provisions druggists in certain cases, and manufacturers when selling in wholesale quantities to *bona fide* dealers trafficking in intoxicating liquors, or in wholesale quantities to any party residing outside of the limits of a municipality which forbade trafficking in liquors. It also provided that each railroad corporation which shall maintain or conduct dining or buffet cars might sell intoxicating liquors on its cars on the payment of $300 or $700, accordingly as the corporation operates 200 or 700 miles of railroad within the State. It was urged that these inequalities of the statute also rendered it unconstitutional, but this view was rejected.

Attention has already been called under a previous point (p. 12) to *Clark* vs. *Titusville*, 184 U. S., 329, where a license on the privilege of doing business, regulated by the amount of sales, was sustained and was held not to be repugnant to the Fourteenth Amendment.

In *Williams* vs. *Fears*, 179 U. S., 270, a Georgia statute which imposed a tax on many occupations, including that of "emigrant agent," meaning a person engaged in hiring laborers to be employed beyond the limits of the State, was held not to deprive such agents of the equal protection of the laws, although the act was not applicable to the business of hiring persons to labor within the State.

In *W. W. Cargill Co.* vs. *Minnesota*, 180 U. S., 452, an act to regulate the receipt, storage and shipment of grain at elevators and warehouses on the right of way of railroads, depot grounds and other lands used in connection with such line of railway, was held not to be invalid by reason of its non-application to those who own or operate elevators and warehouses not situated on the right of way of a railroad.

Mr. Justice Harlan said:

> "If in the judgment of the State it was necessary for the public interest, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute."

In *Hatch* vs. *Reardon*, 204 U. S., 152, a tax of two cents a share imposed on transfers of stock made within New York State, was held not to violate the equal protection clause as an arbitrary discrimination because only imposed on transfers of stock, or because based on par, and not market, value.

In *Bacon* vs. *Walker*, 204 U. S., 311, a classification in grazing countries of sheep, as distinguished from other cattle, was held not to be unreasonable and arbitrary in a regulation governing the use of public lands.

See also:

Halter vs. *Nebraska*, 205 U. S., 43-46.

In *Watson* vs. *Maryland*, 218 U. S., 173, the medical registration law of Maryland was sustained, although its provisions do not apply to those who

practiced prior to a specific date and *treated at least twelve persons within a year prior thereto;* nor to those rendering gratuitous services, nor to physicians in hospitals. Mr. Justice Day said:

> "We shall not take occasion to consider each of these exceptions. A reading of them makes it manifest that they are not without reason. Before a law of this kind can be declared violative of the Fourteenth Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the Court must be able to say that there is 'no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.'
>
> * * *
>
> "The stress of the argument for the plaintiff in error as to these exceptions is put upon the exemption of resident physicians at hospitals and students on hospital and dispensary duties. The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive and apply equally to all persons similarly situated. We cannot say that these exceptions nullify the law. *The reason for them may be that hospitals are very often the subject of state or municipal regulation and control and employment in them may be by boards responsible to public authority under state law or municipal ordinance.* Certainly the conduct of such institions may be regulated by such laws or municipal regulations as might not reach the general practitioner of medicine. In any event, we cannot say that these exceptions are so wholly arbitrary and have such slight relation to the objects to be attained by the law as to require the

courts to strike them down as a denial of the equal protection of the law within the meaning of the Federal Constitution."

In *Heath & Milligan Co.* vs. *Worst,* 207 U. S., 338, a statute of North Dakota requiring the manufacturers and vendors of mixed paints to label the ingredients composing them, was held not to be a denial of the equal protection of the law, although the requirements of the statute were not applicable to paste paints. The court said:

"We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislation. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.' Mobile Co. *vs.* Kimball, 102 U. S. 691. And this necessarily on account of the complex problems which were presented to government. Evils must be met as they arise and according to the manner in which they arise. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of State laws redressed by it. * * * there is a distinction between the paints (mixed paints and paste paints), and the evils to which the statute was addressed may not exist or be as flagrant in one as in the other. There, indeed, may be a degree of competition between them, but other circumstances and conditions may

have directed the legislative discretion. This record certainly does not present any data to make it certain that the discretion was arbitrarily exercised. *Legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable.* Ozan Lumber Company *vs.* Union County National Bank, 207 U. S., 251. * * * It may be that it would have been more entirely adequate, let us say, even more entirely just, to have required that all paint should be labelled, the statute nevertheless cannot be brought under the condemnation of the Fourteenth Amendment. Legislatures, as we have seen, have the constitutional power to make unwise classifications.

In *Ozan Lumber Company* vs. *Union County National Bank*, 207 U. S., 251, a statute of Arkansas which provided that all notes given for payment of patented articles must show that they were so given, and permitting defenses to be made to such notes in the hands of third parties, was sustained, notwithstanding a provision that it should not apply to merchants and dealers who sell patented articles in the usual course of business, the purpose of the legislation being to create and enforce a police regulation, aimed principally at itinerant venders of patented articles.

In *Miller* vs. *Oregon*, 208 U. S., 412, a statute providing that no female shall work in certain establishments more than ten hours a day, was sustained so far as respected laundries, regard being had for woman's physical structure and the protection of the maternal functions, which were considered as justifying differentiation by sex. Mr. Justice Brewer said:

> "Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. * * * Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him (her brother), it would still be true that she is so constituted that she will rest upon and look to him for protection."

In *Lemieux* vs. *Young*, 211 U. S., 489, and *Kidd, Bater & Price Co.* vs. *Musselman Grocer Co.*, 217 U. S., 461, the so-called sales-in-bulk statutes were sustained, even though their provisions applied solely to retail merchants.

In *Wilcox* vs. *Consolidated Gas Co.*, 212 U. S., 19, which involved the constitutionality of the New York Eighty Cent Gas Law, it was, among other things, decided that the provisions in the act which established one rate for the City of New York and another for individual consumers, was not an unreasonable classification and did not constitute an invasion of the equal protection clause.

In *Hammond Packing Co.* vs. *Arkansas*, 212 U. S., 322, it was held that the difference between the extent of the power which the State may exert over the doing of business within its boundaries by an individual, and that which it can exercise as to corporations, furnishes a distinction authorizng a classification between the two which does not violate the equal protection clause.

In *Williams* vs. *Arkansas*, 218 U. S., 79, a classification in a State statute prohibiting drumming or

soliciting on trains for business for any "hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeon or other medical practitioner," and not prohibiting drumming or soliciting for other purposes, was held not to be unreasonable or as constituting a denial of the equal protection of the laws.

Chief Justice Fuller, in concluding his opinion in that case, approved of the language of Mr. Justice Holmes in *Missouri, Kansas and Texas Ry. Co.* vs. *May*, above quoted.

In *Standard Oil Co.* vs. *Tennessee*, 217 U. S., 413, the provisions of the Tennessee anti-trust law prohibiting arrangements for lessening competition, under which corporations are proceeded against by bill in equity for ouster, while individuals are proceeded against as criminals, by indictment, trial, and punishment on conviction, were held not to trench upon the equal protection clause. Mr. Justice Holmes said:

> "The foregoing argument is one of many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment."

In *People* ex rel. *Williams Engineering & Contracting Co.* vs. *Metz*, 193 N. Y., 148, a statute limiting the hours of labor on public works to eight hours in any one calendar day was followed with the proviso that "nothing in this section shall be construed to apply to persons regularly employed in State institutions, or to engineers, electricians and elevator men in the department of public buildings during the annual session of the legislature nor to the construction, maintenance and repair of highways outside the limits of cities and villages."

This proviso was held not to invalidate the act, Judge Vann saying:

> "It is urged that the Labor Law makes discriminations when there are no differences; that it arbitrarily discriminates between persons employed by private individuals and those employed by the State or by municipal corporations, and with no adequate reason exempts from the latter three classes of persons. It is insisted that it is a capricious distinction to permit a laborer digging ditches for a farmer to agree to work ten hours a day, while if he does the same kind of work just across the line for a city he cannot agree to work more than eight hours, even if he wishes to work longer and the city is willing to pay him all he asks.
>
> "One purpose of the Fourteenth Amendment is to prevent State legislatures from making discriminations without any basis; in other words, to do away with class legislation. Following the decisions of the Supreme Court of the United States upon the subject, we have held that there must be some basis for classification, but that a basis is sufficient, even if it seems unreasonable to the courts, provided there is reason enough for it to support an argument so that it could have seemed reasonable to the legislature. * * *
>
> "We regard discussion of the question involving discrimination between persons employed by private individuals and those employed by municipal corporations as foreclosed by the decision of the Supreme Court of the United States in Atkin *vs.* Kansas (191 U. S., 207, 220). * * * This decision was cited with approval in the somewhat analogous case of Ellis *vs.* United States (206 U. S., 246, 255). * * *

"The relator claims that it is denied the equal protection of the laws because all in the same class are not treated alike, inasmuch as persons regularly employed in State institutions, engineers, electricians and elevator men in the department of public buildings, etc., * * * are exempted from the operation of the Labor Law.

"We do not regard this classification as arbitrary or capricious within the rule governing the subject, for it has some reason to support it and, hence, was within the power of the legislature. Employees with duties to be discharged in the night time, or partly by day and partly by night, as in asylums, prisons and the like, and those who operate the machinery for heating and lighting the State Capitol when the legislature is in session, may properly receive separate classification in order to prevent public injury and inconvenience. Here, also, the State was dealing with its own agencies and had the right to promote its convenience and welfare by making a distinction between those who perform manual labor for the most part and those who work largely with their brains. The one class of duties involves greater bodily fatigue than the other, and as positions in State institutions are regarded as higher in rank and less exacting, they are eagerly sought for as more desirable.

"The exemption of those employed in working upon highways outside the limits of cities and villages, apparently applies only to employees of counties and towns, or of the State, or contractors therewith, as in building and repairing State roads and the like. This is in conformity with the custom in rural districts, where, as it may be argued, the crops could

neither, be planted nor gathered by laboring but eight hours a day. The reason for the distinction may not be conclusive, but it will support an argument, which is sufficient. Moreover the employees in the exempt classes, as a rule, work away from home, under circumstances, conditions and surroundings which differ from those affecting employees working near their homes in cities and villages. The law requires equality only among those similarly situated, and this rule, we think, was observed by the statute in question."

See also—

Erb vs. *Morasch*, 177 U. S., 584.
Interstate Con. Street R. R. Co. vs. *Massachusetts*, 207 U. S., 79.
State vs. *McFarland*, 110 Pac. Rep., 792.

In ex parte *Crowder*, 171 Fed. Rep., 250, a statute of Washington required peddlers, excepting peddlers of agricultural or farm products, books, periodicals or newspapers, to procure a license in each county, except in cities and towns having ordinances regulating the business, to pay a license fee of from $100 to $250 per year, and to make a special deposit of $500, to remain until after the year's term of the license therefor shall have expired. This was held to be a valid police regulation and not violative of the equal protection clause or creative of an invidious burden on interstate commerce.

In *State* vs. *Foster*, 46 Atl. Rep., 833, the Supreme Court of Rhode Island sustained an act requiring itinerant vendors before selling their goods, to take out a State license for $200 and a local license for $100, if in a city of less than 15,000 inhabitants, and $350 if in a city of over 15,000 inhabitants, and also deposit $1,000 with the State Treasurer, to be held for sixty days after the expiration of the license to satisfy the claims of creditors.

In *Daniels* vs. *State*, 50 N. E. Rep., 74, the Supreme Court of Indiana sustained a liquor license law which contained a provision that it should not apply to persons engaged in the liquor business as wholesale dealers who do not sell in less quantities than five gallons at a time, although it was claimed that this legislation discriminated in favor of wholesalers against retail dealers.

To the same effect is

Strauss vs. *City of Galesburg*, 67 N. E. Rep., 836.

Statutes similar to those involved in the four cases last cited have been in force in New York ever since 1857.

(6) *Classification Based on Money Limitations.*

In the course of his opinion in *Lee* vs. *O'Malley*, above cited, Mr. Justice Bijur remarked that he had "not been referred to any case in which a classification based solely on degrees of wealth has been held valid." This statement is clearly the result of oversight. In *Musco* vs. *United Surety Co.* (supra), a classification based on the amount of capital and credit of one carrying on the banking business, was expressly recognized. Many other of the cases above cited proceed on similar bases of classification, particularly *Magoun* vs. *Illinois Trust Co.*, 170 U. S., 283, 294, and *Clark* vs. *Titusville*, 184 U. S., 329.

In *Bush* vs. *New York Life Insurance Co.*, 135 App. Div., 447, a somewhat similar question arising under section 96 of the Insurance Law, was passed on, which reads:

> "No domestic insurance corporation, *except a corporation more than one-half of the outstanding insurance of which on December*

thirty-first, 1905, consisted of industrial insurance, shall issue in any year new policies for a larger amount in the aggregate than as follows: *If the total amount of the insurance in force on the thirty-first day of December of the preceding year * * * is in excess of* $50,000,000, *the amount of new insurance which may be issued shall be determined by the following percentages, etc."*

Dealing with the constitutional clause now under discussion Mr. Justice Ingraham said:

> "Equal protection of the law does not require the State to grant to each corporation that it organizes the same power to transact business or in relation to its business."

In *re Home Discount Company,* 147 Fed. Rep., 538, seems entirely on all fours on this proposition with the present case. There the constitutionality of an act of Alabama regulating the business of money brokers, was under consideration. It provided "that all persons engaged in the business of money brokers or loaning money or taking security therefor by bills of sale, mortgages on or conveyances or liens of any kind on personal property, or personal effects or other personal security * * * shall when such loan is made express in the instrument securing such loan, the rate of interest at which said loan is made, the date of said loan * * * and shall within five days thereof file said instrument for record." It expressly declared that any contract for the loan of money in violation of the act was to be void. It required a money lender, if a non-resident, to give a bond to pay all damages that any person may sustain by reason of the enforcement or attempt to enforce any security taken for a loan in violation of the act. It limited the

amount of the attorney's fee for services in relation to the collection of a claim. The fifth section provided:

> "Nothing in this act shall apply to the business of banking and loans, when the amount exceeds seventy-five dollars."

It was claimed that the exception of the business of banking and that the limitation of the act to loans of less than $75 rendered the statute unconstitutional. This contention was overruled, Judge Jones—a most distinguished jurist—saying:

> "Perfection is no more to be exacted in legislation than in other human work. The motives and interests animating men, and the economic, industrial, social, and moral conditions which affect the welfare of society, are almost infinite in number and character, so that it is impossible, in practice, without creating evil and injustice, to apply the same unbending rule to all of these varying situations in dealing with concrete human affairs. Legislative power, therefore, must frequently indulge in marked differences between persons and things in its attempts to remedy particular evils. Neither the state nor the federal Constitution exact perfect equality in the apportionment of burdens which the State finds it necessary to impose upon men to advance the public weal. Mere want of equality in the burdens imposed, or varying rules for the conduct of different persons, even in relation to the same general subject-matter, will not avail to overthrow a statute, if the differences it makes are not merely arbitrary. If its distinctions are based upon some just reason, and it does not attempt, under the guise of regulating an evil, to deprive of liberty or property without due process, or unjustly to

confer special or exclusive privileges upon one class at the expense of others, or to put burdens and penalties upon persons beyond the extent to which their conduct and relations to an evil fairly subject them, in view of the principle upon which the regulations are rested, the statute is not objectionable on constitutional grounds.

"The mischief which called forth the statute is well known. It arose in the contracting and collection of small loans in dealings with necessitous borrowers and small wage-earners, who as a rule had no security except the pledge or assignment of wages to be earned and household goods. The borrowers agreed to whatever rate of interest was demanded. In this case, the rate was 120 per cent. per annum. As an assignment or hypothecation of wages, generally, without regard to some subsisting contract is not valid here, lenders took an assignment of wages to be earned under some particular contract. When disputes arose between borrower and lender as to the date or amount of payments made, or the date or the amount of the loan or the borrower was slow in meeting promises, the lender would file with the employer the instrument assigning the wages. The laborer was thus prevented from receiving his wages, although he continued to work, until the dispute was settled. Cut off from his means of subsistence, the borrower was almost invariably forced to succumb to the demands of the lender. Much suffering ensued among laborers, and great harassment and injury resulted to employers, who could not determine with any certainty how long their employees or laborers would remain in their service under contracts.

which had already assigned their earnings as to which disputes were likely to arise at any time. Railroad companies, owners of furnaces and mills, and other large employers of labor, made and enforced rules, for their own protection, that employees who had unsettled disputes about an assignment of their wages should be laid off, and if the dispute were long continued, should be discharged. Lenders became, in fact, the controllers and dictators of the labor of the borrowers. The differences between lenders and borrowers, and the steps which employers felt compelled to take in consequence, brought on conditions which were yearly reducing hundreds of laborers and other small wage-earners to a condition of serfdom in all but name. In the 'business of banking,' these small loans were seldom, if ever, made to this class of borrowers on the security named in the statute. The profit from these loans attracted another and different class of lenders who, as the Legislature knew, monopolized the loans of this class of borrowers and engaged in evil practices, in which banks and bankers did not indulge in the rare instances in which they made such loans. Loans by banks and bankers under $75, and loans over that amount, no matter by whom made, were rarely secured by an assignment of future wages or a lien upon household goods, and were not productive of the evil which the statute seeks to cure. The Legislature knew that the taking of the security named by one class of lenders had almost invariably brought forth evil, while the same loans, on the same security, by another class in the 'business of banking,' had seldom, if ever, been harmful to the public welfare. The lawmakers, in devising a remedy, had to consider the different habits

and conduct of men in these occupations as to these loans, in order to apply an intelligent and just preventive, and in doing so, necessarily discriminated between these classes, according to the well-known habits and customs in the matter. No discrimination is made by the statute between those classes as to the right to contract. All alike are permitted to make these small loans on the security named. No class is licensed or taxed for anything done in connection with them. All classes are left to stand on the same footing in all these respects. The only discrimination is that one class of lenders is required to state, while the others are not, the truth in certain simple particulars as to the actual transaction in the instrument which evidences it and to record that instrument. The statute is a police regulation, pure and simple, to check usury and promote fair dealing in loans between one class of money lenders and one class of borrowers on a particular kind of security, by requiring certain statements to be put in their contracts and that they be recorded. If the practice of one class of money lenders makes such precaution necessary as to them, it would be going an unwarranted length to hold that the state police power must either leave them entirely alone or else provide the same regulations, regardless of any need for them, for like loans made by all other classes of money lenders. *S. John* vs. *New York*, 201 *U. S.*, 637. Such a contention has met with almost universal disapprobation in the courts, both state and federal. If the court should strike down the statute for the reason here urged it would be a bald invasion by the judiciary of the legislative prerogative, in a matter over which the Constitution has left the lawmaker almost boundless discretion, simply

because the meshes of the statute have not been woven so fine as to gather in every possible offender in every other branch of the money lending business.

"The presumption is that the Legislature acts in good faith. The statute shows beyond peradventure that the lawmaker had a *bona fide* purpose to cure a wrong and had no design to unjustly discriminate, and has not done so, between the class whose conduct it regulates and those whose conduct it leaves unregulated, as regards these small loans. The Legislature could well regulate the conduct of one class and leave the other unregulated, and discriminate between loans under and those over $75. *Commonwealth* vs. *Danziger,* 176 *Mass.* 290, 57 N. E., 461. This statute clearly does not fall within the principle which vitiates legislation forbidding one set of men to take usury and at the same time permitting others to do so. The laws regarding usury are not changed by the local statute, and still bear alike on all classes, whether they fall within or without the regulations of the statute, and it does not give any class any advantage over the other in this respect. The statements exacted in the written contract and that it be registered are not burdensome, and do not deprive the lender of any right or property. They are only reasonable regulations of a right. Save as denied by the express prohibitions or necessary implications of state and federal Constitutions, the legislature has boundless power over such matters."

In *White* vs. *Missouri, K. & T. R. Co.,* 130 *S. W. Rep.*, 325, the Supreme Court of Missouri decided that a statute providing that garnishment shall not issue in a case *where the sum demanded is not over*

$200, and where the property sought to be reached is wages due the defendant from a railroad, until after the recovery of judgment, did not constitute abritrary class legislation, the act being considered as in favor of railroad employees receiving small wages, whose condition was such as to justify such classification.

Numerous other instances of classification based on a money limitation, the validity of which has never been questioned, are familiar.

(*a*) In the *General Business Law of New York, Sec.* 46 (*Re-enactment of Laws of* 1883, *ch.* 339, *sec.* 7) it is provided:

> "No pawnbroker shall ask, demand or receive any greater rate of interest than three per centum per month, or any fraction of a month, for the first six months, and two per centum per month for each succeeding months, *upon any loan not exceeding the sum of one hundred dollars, or than two per centum per month for the first six months and one per centum per month for each succeeding month on any loan exceeding the sum of one hundred dollars.*"

(*b*) In sec. 379 of the *General Business Law,* derived from Laws of 1882, ch. 237, sec. 1, it is provided:

> "In any case hereafter in which advances of money, repayable on demand, *to an amount not less than five thousand dollars,* are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect as compensa-

tion for making such advances, any sum to be agreed upon in writing, by the parties to such transaction."

To the same effect is *sec. 75 of the Banking Law.*

(*c*) From time immemorial there has been a distinction between grand and petit larceny, based on the value of the property which was the subject of the crime.

(*d*) For many years the right to appeal to the New York Court of Appeals was limited to cases in which the amount in controversy exceeded $500.

Butterfield vs. *Rudde,* 58 N. Y., 489.

(*e*) The jurisdiction of the United States Circuit Court has in like manner been limited to cases involving a subject matter of the value of $2,000.

(*f*) For many years the appellate jurisdiction of this Court was limited to cases involving $5,000.

(*g*) In the several acts that have from time to time been passed by Congress, imposing taxation on incomes, incomes of less than a specified amount have been exempted from taxation.

(*h*) So, also, the tax imposed by sec. 27 of the War Revenue Act of 1898, upon gross annual receipts in excess of $250,000 of certain specified corporations, was sustained.

Spreckels Sugar Refinery Co. vs. *McClain,* 192 U. S., 397.

(*i*) Under the several inheritance tax laws, and acts taxing transfers of property passed in various States, transfers below certain specified amounts have been uniformly exempted.

(*j*) In practically every State of the Union the Legislatures, following the Statute of Frauds (28

and 29 Charles II), have declared contracts for the sale of goods, wares and merchandise of the value of *more than* $50, unless in writing, to be void.

(*k*) In the present *Bankruptcy Law, sec.* 4, it is provided that "any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil * * * owing debts to the amount of *one thousand dollars or over,* may be adjudged an involuntary bankrupt."

(*l*) By *section* 25 *of the Bankruptcy Law* one of the limitations of the right to review proceedings in bankruptcy is defined in the words "from a judgment allowing or rejecting a debt or claim of *five hundred dollars or over.*"

(*m*) In the *New York Municipal Court Act,* as amended by the Laws of 1903, Chapter 156, it is provided that in actions to enforce a written contract of conditional sale, the right to an order of arrest on the ground that the defendant wilfully or maliciously disposed of or concealed the property or a part thereof covered by the instrument on which the suit was instituted, is confined to cases where the sums due and payable "*amount to more than one hundred dollars.*"

It would seem, from these precedents, that the present statute does not create a novel standard in legislation from the fact that it requires a person engaging in the business of private banking to deposit with the Comptroller money or securities to the amount of $10,000, and to give a bond for the protection of his creditors for an additional sum. It would rather appear to be novel, to assert the proposition, in view of the facts which are disclosed in the report of the Immigration Commission, that the possession of capital by one engaging in the business of banking should be dispensed with, and that there should be

no classification based on the possession of capital, or based on the character of the business conducted by the so-called banker.

As a generalization it may be true as suggested by Mr. Justice Bijur, in the opinion above cited, that "the integrity and sound business judgment of the banker" is the most important assurance of safety to a depositor. It would nevertheless be considered most remarkable if the Legislature should pass a law which would enable an individual to carry on the business of banking without regulation of any kind, provided he possesses "integrity and sound business judgment." Who is to determine the existence of these high qualities? When is the determination to be made? It is well known that men have for many years enjoyed the reputation of business integrity and sound business judgment, only to give indication at times of temptation or of stress, that these assets were vanishing quantities. It would seem as though the provisions of the act now under consideration would afford a more practical basis of protection than the Utopian security offered by the opinion of Mr. Justice Bijur, who very frankly admits that his doubts as to the validity of the basis of the classification found in the act under review, "have been somewhat weakened" by the views of the Court of Appeals as expressed in *Musco* vs. *United Surety Co.* (*supra.*)

Mr. Justice Bijur finally plants his decision, on the provision which limits the application of the act, to bankers whose deposits are of an annual average of less than $500. The learned Justice is of the opinion, that it is not a sufficient justification for this distinction for the Legislature to have argued that persons of modest means, whose deposits average less than $500 annually, are less likely to be able

adequately to protect their own interests than would be persons who make larger deposits.

This conclusion ignores the facts disclosed in the report of the Immigration Commission, and particularly in the statistical tables to which it refers. It is shown that, in the course of a single year, in the City of New York, millions of dollars were lost by small depositors; while at the same time, notwithstanding the fact that a severe financial panic was raging, which resulted in the failure of a number of important banking institutions, not a single depositor in the latter institutions lost a dollar, whereas, in the smaller insitutions there was practically a total loss.

It likewise is diametrically opposed to the facts detailed in the report of the Federal Immigration Commissioner on "Immigrant Banks," and to the observations of the Chamber of Commerce of Cleveland, Ohio, to which reference has several times been made.

Under the present law, these small depositors would at least be affected some security, which would inure to their benefit automatically in the event of insolvency. Even in the case where, on the execution of a bond of $100,000, the provisions of the statute with regard to the making of reports would not be operative, there is at least afforded the unconditional security of $100,000 for the benefit of the depositors.

Mr. Justice Bijur, as if to end the argument, says:

> "Finally, I neither find in the report of the Commission nor in my own experience evidence that depositors of small sums are less intelligent, able or zealous in protecting their interests than are other depositors. My impressions are rather to the contrary."

In the light of the facts disclosed by the report of the Commission, and of the general experience of mankind, this statement seems most extraordinary. Can it be seriously argued, that a newly arrived immigrant, whose savings are necessarily small, ignorant of business conditions, imposed with the general idea that a bank is a semi-divine institution, or that any member of the community whose earnings are inconsiderable in amount, is as able to take care of himself as one whose average deposits are $500? The latter may be presumed, without disregarding the teachings of experience, to be possessed of a sufficient degree of worldly wisdom which will enable him not only to become possessed of that amount of money, but also to exercise reasonable precaution in taking care of it. The statistical tables to which reference has been made show, that the overwhelming preponderance of deposits made with the private bankers who failed or absconded, were very small—very few as large as $100, and that the deposits of larger amounts constituted a very meagre percentage of the deposits.

The Legislature and the various members of the State government, who gave this subject careful study and attention, and the more intelligent of the private bankers who were called as witnesses before the Immigration Commission, were certainly impressed by the thought that, under existing conditions, classification based on the average amount of deposits, rested on a reasonable and not a capricious test.

The findings of the Congressional Immigration Committee, contained in its report on Immigrant Banks, contain the following statements, which show that experience is at war with the argumentation on which the appellant relies (pp. 22, 23):

> "In this connection it is important to bear in mind that the immigrant banker deals almost

wholly with the great body of floating alien labor—that is, those of more recent arrival—who constitute a class farthest removed from Americanization, notably unversed in financial matters, easily influenced by racial appeal, and largely dependent upon the leaders of their nationality. A successful Italian banker, in commenting upon the ignorance and trustfulness of his patrons, pointed out the ease with which he could exploit them should he so desire. According to this informant, it is not uncommon for laborers who have made deposits to lose their receipts, and, forgetting how much is due them, to take without question whatever balance the banker returns. A member of a leading steamship agency in a large city, which acts simply as depositing agent in assisting immigrants to open accounts in responsible banks, testified that should his firm care to solicit or even to receive without solicitation these deposits, it could command at least $200,000, so frequently and insistently are sums tendered for safe-keeping. Others have emphasized the fact that any one who can obtain the confidence of the immigrant laborer is not only in a position to command a large amount of capital, but to command it freely and untrammeled. It is this confidence which the immigrant banker easily inspires, and upon which he relies. * * *

"The great hindrance in securing immigrant patronage for American banks lies in the alien's ignorance of the English language. Inability to read and write, necessitating the transaction of business through an interpreter, combined with a poor comprehension of the checking system and other banking devices, is apt to cause him to prefer the money-belt to the bank, the saloon-

> keeper to trust company. * * * Not possessed of an intelligent grasp of financial questions, the average immigrant is easily excited in money matters. Perhaps he does not differ essentially from some American depositors in this respect, but he is quicker to accept the assurances of irresponsible persons that his money will at all times and under any conditions be available. This assurance he obtains from the immigrant banker. Thus the man of his own race, be he saloon-keeper, grocer, boarding boss or banker, who agrees to pay on demand at any hour, is more likely to become the custodian of the immigrant's savings than are institutions of unquestioned strength and reliability."

In the report of the Special Committee on Irresponsible Private Banks of the Cleveland Chamber of Commerce, presented in 1908, the same idea is pointed out:

> "Their very suspicion and ignorance is the opportunity of designing persons among their countrymen, who, under the guise of friendly intervention, secure their little savings and use them for their own benefit."

The report concludes with the statement that it has been made "*all with the purpose of protecting those who cannot protect themselves.*"

The decision of Mr. Justice Bijur is a judicial declaration, that this reasoning was unsound, that it was not as good a classification as one based on "the integrity and sound business judgment" of the banker, and that it was not "based on any substantial distinction." It would seem as though this were stretching the judicial power to an unwonted degree, and that it loses sight of the well established

limitation on the judicial power as expressed by Judge Vann in *People* ex rel. *Farrington* vs. *Mensching,* 187 *N. Y.*, 16, and as defined in the numerous decisions of this Court above cited.

It especially appears to lose sight of the principle laid down in the most recent decisions of this Court, notably in *Ozan Lumber Co.* vs. *Union County National Bank*, 207 *U. S.*, 251, and *Milligan Co.* vs. *Wurst*, 207 *U. S.*, 338, that "legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable."

(7) *The decision in Cotting* vs. *Kansas City Stock Yards Company,* 183 U. S., 79, *on which the complainants rest their argument of unequal protection, does not apply here.*

There it clearly appeared that the decision was placed on the ground that the act was so framed that it was to apply only to one corporation and not to other corporations engaged in like business in Kansas. The description of the corporation which was contained in the act was such as to point out but one entity to which its provisions could be made applicable.

This was very properly declared to constitute arbitrary selection and not classification, and in this respect the case is distinguished from the prior and subsequent decisions of the Supreme Court, which are cited herein.

That this was the ground of decision appears from the memorandum of Mr. Justice Harlan, with whom Justices Gray, Brown, Shiras, White and McKenna concurred,

> "We assent to the judgment of reversal—so far as the merits of this case are concerned—

> upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws" (p. 113).

The right of the Legislature to classify those engaged in any particular business was not questioned. What this Court criticised was the fact that a single individual or corporation was arbitrarily selected by the Legislature for regulation, and that the express and only basis of classification was in the amount of business done by the two classes of stockyards, one class consisting of those doing a large business and the other, of those doing a smaller business. There is no similarity between the classification condemned and that now under discussion because here the amount of business done by a private banker is not taken into consideration. It is the character of the business which controls irrespective of its volume, whether large of small. The average amount of "each sum received on deposit or for transmission" in the ordinary course of business, as indicating the nature of the deposits and the need of the depositor for protection, rather than the wealth or earning power of the banker which is made the basis of classification without regard to the aggregate amount of deposits coming into the hands of the banker.

Mr. Justice Brewer summarizes the criticism of the statute which he had under review, in the following language which does not apply to the statute now under consideration:

> "In short, we come back to the thought that the classification is one *not based upon the char-*

acter or value of the services rendered but simply on the *amount of business which the party does*, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, *yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.* The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife?"

The right to classify on grounds other than that of arbitrary selection based on wealth and prosperity is, however, expressly recognized by Mr. Justice Brewer, for he says, at page 111:

"So again exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which

interests may often be promoted by certain regulations affecting one class which do not affect another—certain burdens imposed on one which do not rest upon another.

But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business *and under the same conditions* burdens are cast which are not cast upon the other. * * * This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification *is based upon inherent differences in the character of the business*, but is a positive and direct discrimination between persons engaged in the same class of business *and based simply upon the quantity of business which each may do.*"

IV.

There is nothing in this legislation which comes within the purview of the commerce clause; but, on the contrary, it is a legitimate exercise of the police power.

The adverse contention proceeds on the theory that, because private bankers, in the course of their business, transmit money, to a large or limited ex-

tent, to other States and to other countries, the State cannot deal with them so as to regulate their business, or protect its citizens, or exercise powers of supervision.

It appears from the bill, that the complainant is engaged in private banking, that he is engaged in "the business" of receiving deposits of money for safe-keeping, for transmission, and for other purposes. It is argued, however, that because some of the money received for transmission is sent beyond the State boundaries, therefore this act constitutes an interference with interstate commerce.

(*a*) *Appellant's contention would prohibit all regulation of State banks transmitting money beyond State boundaries.*

The same line of reasoning would prohibit the Legislature from regulating incorporated banks, or other lines of business, since it is likely that those engaged in conducting such undertaking transmit money to other States and countries, and have dealings with residents of other States.

If that circumstance should prohibit the State from regulating a business in the course of which there are dealings which extend beyond State lines, then it would be difficult to conceive of a case in which it might not be contended with as much force as in the present, that there has been an invasion by the State Legislature of the power to regulate commerce between the States and with foreign nations.

It was similarly contended with respect to the Wells Law, that it was an infringement on the exclusive right of Congress to regulate foreign and domestic commerce because the persons coming within the purview of the act received deposits of money for transmission to foreign countries.

In *Musco* vs. *United Surety Co.*, 196, N. Y., 466, which has already been three times cited in this brief, Judge Hiscock said:

> "If we assume that persons designated in the act receiving deposits for transmission would ship the actual money and therefore might be said to be engaged in commerce, it still is apparent to us that the act was not passed for the purpose of regulating that branch of the business. It was passed for the purpose of regulating and safeguarding the business of receiving deposits, which is a business and transaction by itself preceding and not to be confounded for the purposes of this discussion with the later transmission of the money, although leading up to such transmission. The act is entitled 'An act to regulate the taking of deposits,' and it relates to those who, in conjunction with the business of selling tickets, 'carry on the business of receiving deposits of money for the purpose of transmitting the same.' It does not purport to affect those merely engaged in forwarding money or to regulate or prescribe the method in which the money shall be forwarded or transmitted. It applies to the act of receiving on deposit moneys to be transmitted some time in the future, and it is perfectly clear that great opportunity for fraud and loss would arise in connection with these deposits which were withdrawn from the observation and custody of the depositor on a promise at some time in the future to transmit them, and that it was the intent of the Legislature to guard against the embezzlement or loss, even by ignorance on the part of the banker, of these moneys pending the proposed subsequent transmission. The acts of receiving the deposits and

of subsequently transmitting them, although they may be related, are still entirely distinct.

"The authority amongst the cases called to our attention which seems most nearly to fit the facts in this case is that of *Williams* vs. *Fears* (179 U. S., 270). That case presented for consideration the act of the State of Georgia whereby a specific tax was levied upon the occupation of 'immigrant agent,' meaning a person engaged in hiring laborers within the State, but to be transported and employed beyond its limits, and it was held that the levy of this tax did not amount to such an interference with the freedom of transit or of control as to violate the Federal Constitution.

"It is doubtless true that his statute regulating the receipt of deposits may incidentally and indirectly affect the business of transmitting moneys abroad. But it is well settled that the law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the Federal jurisdiction or strictly a regulation of interstate commerce, but is to be considered as an ordinary police regulation and therefore not invalid (*Hennington* vs. *Georgia*, 163 U. S., 299)."

(b) Banking and its several branches do not come within the "commerce clause."

Before considering the further authorities bearing on the question as to whether or not, assuming that private banking is "commerce" in the constitutional sense of the term, this legislation can be said to conflict with the commerce clause, we will briefly consider the question as to whether "private banking" comes within that clause.

"Commerce" is defined by the lexicographers as that intercourse and traffic which has to do with the exchange of commodities.

Burrill says that in a strict sense commerce is traffic in merchandise. Webster describes it as "an interchange or mutual change of goods, wares, productions or property of any kind, as between nations or individuals, either by barter or by purchase and sale; trade; traffic." The Century Dictionary defines it to be "interchange of goods, merchandise or property of any kind; trade; traffic; used more especially of trade on a large scale carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as foreign commerce and internal commerce."

In a larger sense it comprehends intercourse for purposes of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between the citizens of one country of the citizens or subjects of other countries and between the citizens of different States.

Welton vs. *Missouri*, 91 U. S., 275.
Passenger Cases, 7 How., U. S., 283.

It includes navigation, the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities

Field, *J.*, in *Mobile County* vs. *Kimball*, 102 U. S., 691, 702.
Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S., 196.

"The real distinction between acts and subjects of commerce and those that are not consists in the difference between commerce or an instrumentality thereof on the one side and the mere incidents

which may attend the carrying on of such commerce on the other."

Mr. Justice White in *Hooper* vs. *California*, 155 U. S., 648.

It has accordingly been held that the business of insurance is not commerce, and is not interstate commerce, even though the insurer and insured are of different States; this proposition including both marine, fire and life insurance.

Paul vs. *Virginia*, 8 Wall., 168.
N. Y. Life Ins. Co. vs. *Cravens*, 178 U. S., 179.
Philadelphia Fire Assn. vs. *New York*, 119 U. S., 110,
Hancock Ins. Co. vs. *Waren*, 181 U. S., 73.
Security Mutual Ins. Co. vs. *Prewitt*, 202 U. S., 249.

It has likewise been held, in *Nathan* vs. *Louisiana*, 8 How., U. S., 73, that the building of ships or dealing in bills of exchange was not an act of commerce, but the supplying of an instrument of commerce, and does not come within the commerce clause. Mr. Justice McLean said:

"A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

"The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is

desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. The rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on.

"In the case of Briscoe *vs.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257, this court held that a State has power to incorporate a bank; and this power has been exercised by every State in the Union, except where it has been prohibited by its Constitution. And the banks established, it is believed, have been, without exception, authorized to deal in foreign bills of exchange. And this court held in Providence Bank *vs.* Billings and Pitman, 4 Pet. 514, that a State had power to tax a bank, there being no clause in the charter exempting it from taxation. In the case of The Bank of Augusta *vs.* Earle, 13 Pet. 519, it was decided that a bank established in Georgia, having a right in its charter to deal in bills of exchange, could, through its agent and the comity of Alabama, buy and sell bills in that State.

"If a tax on the business of an exchange broker, who buys and sells foreign bills of exchange, be repugnant to the commercial power

of the Union, all taxes on banks which deal in bills of exchange, by a State, must be equally repugnant. * * *

"If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within the territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty."

Nathan vs. *Louisiana* (*supra*), was cited with approval in *Williams* vs. *Fears*, 179 U. S. 270, where it was held that labor contracts negotiated by an emigrant agent engaged in hiring laborers to be employed beyond the limits of the State, were not in themselves the subject of traffic between the States, nor was the business of hiring labor so immediately connected with interstate transportation or interstate traffic that it could correctly be said that those who followed it were engaged in interstate commerce, or that a tax on that occupation constituted a burden on such commerce.

In *Hopkins* vs. *United States*, 171 U. S., 578, it was held that the business of a live stock exchange, being an unincorporated volunteer association of men doing business at stock yards situated partly in Kansas City, Missouri, and partly across the line separating that city from Kansas City, Kansas, the

business consisting of the receipt of consignments of live stock from various states and territories, the preparation of the live stock for market, the disposition of the same, the receipt of the proceeds, and the payment to the owners of their proportion thereof after deducting charges, expenses and advances, did not constitute interstate commerce within the meaning of the Sherman Act. Mr. Justice Peckham put the question to be decided thus:

> "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?"

At page 597 he says:

> "Definitions as to what constitute interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. * * * But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a

local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility.

"The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, engaged in interstate commerce? If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or bonds are not commodities, and that dealers therein are not engaged in commerce. * * * We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made."

In *United States* vs. *E. C. Knight Co.*, 156 U. S., 1, it was held that the business of sugar refining bears no direct relation to commerce between the States or with foreign nations, and that commerce succeeds manufacturing and is not a part of it.

So it has been held that fishing is not commerce.

McCready vs. *Virginia*, 94 U. S., 391.

The mere fact that money may be segregated in the City of New York in the hands of a private banker for the purpose of transmission abroad, makes that money no more an article of interstate or foreign commerce than the manufacture of goods for the purpose of being eventually transported and sold in other States or countries than that in which they are produced, assuming that money can in any way be said to be an article of commerce.

With but slight paraphrase, the reasoning of this Court in *Kidd* vs. *Pearson*, 128 U. S., 1, may be applied:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto institute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every

branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat-grower of the Northwest, or the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management."

See also

Coe vs. *Errol*, 116 U. S., 517.
Cornell vs. *Coyne*, 192 U. S., 418, 428.

In the first of these cases it was decided that goods, the product of a State, intended for exportation, are liable to taxation until actually started in course of transportation to their place of destination, or delivered to a common carrier for that purpose, and that the carrying of them to, and deposit of them at a depot for the purpose of transportation is no part of that transportation.

In the second of these cases the rule of *Coe* vs. *Errol* was applied to a quantity of "filled cheese," manufactured expressly for export. The prohibition against taxes or duties on exports being held to attach to exports as such, and not to relieve articles manufactured for export from the prior ordinary burdens of taxation.

It would seem to result from these decisions that banking of the character affected by the legislation now under consideration is not legitimately included in the term commerce.

Appellant repeatedly refers to section 29*c*, as indicating that this legislation regulates foreign commerce. The purpose of this measure was to correct a serious abuse which was shamelessly practiced by private bankers, who withheld moneys which they agreed to transmit abroad for weeks and months, and too often altogether. If the correction of such an evil is beyond the police power of the State where, it may be asked, can a remedy be found, when, as has been frequently held, Congress is powerless to exercise the police power. The act manifestly seeks to regulate, not foreign commerce, but local abuses.

(*c*) *At the most banking is a mere incident of commerce, which may be regulated under the police power.*

But, assuming that banking is commerce, it is clear, under the authorities, that this legislation is not invalidated by the circumstance that these private bankers are engaged in the transmission of money to other States and countries.

The fundamental error of the complainant's contention is pointed out by Mr. Justice White in *Hooper* vs. *California*, 155 U. S., 655, in language which was applied by Chief Justice Fuller in *Williams* vs. *Fears*, *supra*. He says:

> "* * * the attempt to so distinguish between policies of marine insurance and policies of fire insurance, as to reach the deduction that there is a constitutional difference between the business of a corporation issuing policies of one kind and that of a corporation dealing in policies of the other kind, which affects the question of a State's authority to control the business of either, is based upon a fundamental misconception of the nature of the constitutional provision relied upon. It ignores the real distinction upon which the general rule and its exceptions are

based, *and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other.* This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States, and would exclude State control over many contracts purely domestic in their nature."

In *Osborne* vs. *Mobile,* 16 Wall., 479, a Georgia corporation which was organized to transact a general forwarding and express business had an office at Mobile, Alabama, and there carried on its business, which extended beyond the limits of the State; or, rather, it there made contracts for transportation of that character. An ordinance of the city of Mobile required that every express company or railroad company doing business in that city, and having a business extending beyond the limits of the city, should pay an annual license of $500; one doing business within the limits of the State to pay a license of $100, and one doing business within the city a license of $50. It was held that the ordinance in requiring payment for a license to transact, in Mobile, a business extending beyond the limits of the State of Alabama, was not repugnant to the commerce clause. Chief Justice Chase said:

"It, this case, comes directly within the rules laid down in the case relating to the tax upon the gross receipts of railroads. In that case we

said: 'It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.' We admitted that 'the ultimate effect' of the tax on the gross receipts might 'be to increase the cost of transportation,' but we held that the right to tax gross receipts, though derived in part from interstate transportation, was within the general 'authority of the States to tax persons, property, business, or occupations within their limits.'

"The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts, within the State, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State.".

The same idea was expressed in *Pennsylvania R. R. Co.* vs. *Knight*, 192 U. S. 21, where it was held that a cab service maintained by the Pennsylvania Railroad Company to take passengers to and from its terminus in the City of New York was subject to the control of the State, and that the railroad company was not exempt on account of being engaged in interstate commerce from the State privilege tax of carrying on the business of running cabs for hire between points wholly within the State.

Mr. Justice Brewer, after citing *The Daniel Ball*, 10 Wall., 557, 567, *Diamond Match Company* vs. *On-*

tonagon, 188 U. S., 82, and *Coe* vs. *Errol*, 116 U. S., 517, said:

> "As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

In *Ficklen* vs. *Shelby County*, 145 U. S., 1, it appeared that the plaintiffs in error were commercial agents or brokers, having an office in Shelby County, Tennessee, where they carried on their business. In 1887 they took out licenses under a Tennessee statute which imposed a tax upon factors, brokers, buyers or sellers on commission, or otherwise, doing business within the State, or, if no capital be so invested, then upon the gross yearly commissions, charges or compensation for the business transacted. In the year for which they took out licenses all sales negotiated by the plaintiffs in error were made on behalf of principals residing in other States, and the goods so sold were, at the times of the sales, in other States, to be shipped to Tennessee as sales should be effected. They had no capital invested in their business. They made no return of sales. They then applied for a renewal of their license, which was denied. In an action brought by them to restrain any interference with their current business on the ground that the conditions sought to be im-

posed upon them was a tax upon interstate commerce, it was held that if the tax could be said to affecte interstate commerce in any way, it did so incidentally, and so remotely as not to amount to a regulation of such commerce. Chief Justice Fuller said:

> "No doubt can be entertained of the right of a State legislation to tax trades, professions and occupations in the absence of inhibition in the State Constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.
>
> "The language of the court in Lyng *vs.* State of Michigan, 135 U. S., 161, 166, was: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belong solely to Congress.' But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business."

In *Crossman* vs. *Lurman*, 192 U. S., 189, a statute of New York prohibiting the sale of adulterated food and drugs was held to be valid exercise of the police power and not repugnant to the commerce clause because it applied to merchandise coming from foreign countries. Mr. Justice White said:

> "Indeed, every contention here urged to show that the law of New York is repugnant to the Constitution of the United States was fully and expressly considered and negatived by the decision of this court in Plumley *vs.* Massachusetts, 155 U. S. 461. In that case a law of the State of Massachusetts forbidding the sale of oleomargarine, which was artificially colored, was applied to a sale in Massachusetts of an original package of that article which had been manufactured in and shipped from the State of Illinois. In the course of a full review of the previous cases relating to the subject it was said:
>
> "'If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government; it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in Sherlock *vs.* Alling, 93 U. S., 99, 103: 'In conferring upon Congress the regulation of com-

merce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." * * *"

In *Silz* vs. *Hesterberg*, 211 U. S., 41, 40, which involved the constitutionality of a provision of the New York Game Law, which prohibited the possession of game during the closed season, it was held that the act was a valid exercise of the police power of the State and not an interference with the regulation of interstate commerce, although the game the possession of which was sought to be penalized, had been imported. Mr. Justice Day said:

"It is next contended that the law is an attempt to unlawfully regulate foreign commerce which, by the Constitution of the United States, is placed wholly within the control of the Federal Congress. That a State may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exertion of

their police power, not in conflict with laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."

Citing—

Pennsylvania Co. vs. *Hughes*, 191 U. S., 477.
Asbell vs. *Kansas*, 209 U. S., 251.
Geer vs. *Connecticut*, 161 U. S., 519.

(d) In any event the regulation of private banks though engaged in the transmission of money abroad was the proper subject of State legislation until Congress might choose to deal with the subject which it has not yet done.

It was adjudged in *Covington & Cincinnati Bridge Co.* vs. *Kentucky*, 154 U. S., 209, that the general subject of commerce may rightly be divided into three fields. The first is that in which the power of the State is exclusive; the second, that in which the State may act in the absence of legislation by Congress, which is controlling and exclusive; the third, that in which the authority of Congress is exclusive and the States cannot interfere at all. Within the first field are included regulation by the State of local or intrastate commerce. In the second class are matters in the nature of police regulation affecting interstate as well as intrastate commerce, but as to which there has been no controlling Federal regulation.

This classification has been recognized as recently as in *Smith* vs *Olsen*, 195 U. S., 332, where State laws regulating pilotage, although regulations of Congress, were declared to fall within the class of powers which may be exercised in the States until Congress has seen fit to act on the subject; and in *Atlantic Coast Line R. R. Co.* vs. *Mazursky*, 216 U.

S., 122, where it was held that a State statute which requires a carrier to settle, within a certain specified time, claims for loss of or damage to freight while in its possession within that State, is not, in the absence of legislation by Congress on the subject, an unreasonable interference with interstate commerce, and that therefore such an act is not unconstitutional as to goods shipped from without the State where they actually were in possession of the carrier within the State.

See also—

Missouri, K. & T. R. R. Co. vs. *Haber*, 169 *U. S.* 613.
Reid vs. *Colorado*, 187 *U. S.* 137.
Sinnot vs. *Davenport*, 22 *How., U. S.*, 227, 243.
Smith vs. *Alabama*, 124 *U. S.* 465.
Hennington vs. *Georgia*, 163 *U. S.* 299.
Gladson vs. *Minnesota*, 166 *U. S.* 427.
People vs. *Erie Railroad Co.*, 198 *N. Y.* 369.

There certainly has been no attempt on the part of Congress to regulate private bankers engaged in the transmission of money abroad, and it may well be questioned as to whether or not Congress would have the power to regulate such business conducted within the boundaries of a State, since the police power is reserved to the States and there is no grant thereof to Congress in the Constitution (*Keller* vs. *United States*, 213 U. S., 138).

It is certain that there can be no effective regulation of these private bankers except through the medium of the police power, especially in view of the fact that, even where they receive money for transmission beyond the State, it is conjoined with the other features of banking of a purely intrastate character.

That circumstance alone would require this court to sustain the act, under the decision in *Osborne* vs. *Florida*, 164 *U. S.* 650.

(e) *The decision in McCall* vs. *California*, 136 *U. S.*, 104, *by which it is sought to support the argument that this case comes within the commerce clause, is not in point.*

McCall was the agent of the New York, Lake Erie & Western Railroad Company, which ran between Chicago and New York. He was established at San Francisco for the purpose of inducing traffic between San Francisco and New York to take the line which he represented, at Chicago. This certainly made him an instrumentality of interstate transportation, which has long been recognized as constituting interstate commerce.

This case has been often distinguished and limited, principally in *Williams* vs. *Fears*, 179 *U. S.* 270, a case relating to a tax on emigrant agents, and referred to in our main brief. There Chief Justice Fuller, after stating the facts in *McCall* vs. *California, said:*

> "But their business was *directly* connected with interstate commerce, and consisted *wholly* in carrying it on. The agent was the agent of the transportation company and he was acting *solely in its interest*"

Referring to the case there under consideration, Chief Justice Fuller said:

> "These agents (the emigrant agents) were engaged in hiring laborers in Georgia to be employed beyond the limits of the State. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation or that the tax on his occupation was

levied on transportation. * * * These labor contracts were not in themselves subjects of traffic between the States, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce."

V.

The decree appealed from should be affirmed.

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